

Geoffrey M. Trachtenberg, Esq. (019338)  
Justin Henry, Esq. (027711)  
**LEVENBAUM TRACHTENBERG, PLC**  
362 North Third Avenue  
Phoenix, Arizona 85003  
(602) 271-0183, Fax (602) 271-4018  
[gt@ltinjurylaw.com](mailto:gt@ltinjurylaw.com)  
[justinhenry@ltinjurylaw.com](mailto:justinhenry@ltinjurylaw.com)

Richard S. Plattner (005019)  
**PLATTNER VERDERAME, PC**  
316 East Flower Street, P.O. Box 36570  
Phoenix, Arizona 85067  
(602) 266-2002, Fax (602) 266-6908  
[rplattner@plattner-verderame.com](mailto:rplattner@plattner-verderame.com)

*Co-Petitioners on behalf of the Arizona Association for Justice*

**IN THE SUPREME COURT**  
**STATE OF ARIZONA**

PETITION TO AMEND RULE 67 OF }  
THE ARIZONA RULES OF CIVIL } Petition No:  
PROCEDURE }

Pursuant to Rule 28, Arizona Rules of the Supreme Court, Petitioner respectfully submits this Petition for an amendment to Rule 67, Arizona Rules of Civil Procedure. In particular, Petitioner requests the Court eliminate the provisions in Rule 67 that unfairly limits access to the courts by plaintiffs who “do not own property in Arizona” by requiring them to post a “bond” for costs in the trial court.

1 These provisions, which were long-considered unconstitutional by  
2 experienced judges and lawyers in the community, are now the subject of a  
3 Petition for Review after the Court of Appeals held the provisions were “facially  
4 constitutional” in *Thiele v. City of Phoenix*, 232 Ariz. 40, 301 P.3d 206 (App.  
5 2013).<sup>1</sup>

6 A redlined version of Rule 67, showing the proposed change, is attached as  
7 Exhibit 1 pursuant to Rule 28(A)(2), Arizona Rules of the Supreme Court.

### 8 **Petitioner**

9 Petitioner Arizona Association for Justice, also known as the Arizona Trial  
10 Lawyers Association, is a non-profit organization consisting of approximately  
11 700 Arizona attorneys. It is the sole Arizona bar association expressly dedicated  
12 to protecting the rights of tort victims and insurance consumers. Petitioner’s  
13 members protect their clients and the public through continuing legal instruction,  
14 public education, legislative presentations, legal advocacy, and other work to  
15 maintain and improve a fair and efficient civil justice system.

### 17 **Rule 67**

18 Rule 67 is divided into two parts. Part one consists of Rules 67(a) through  
19 (c), which relate to deposits of disputed money or property with the court. Part  
20 two consists of Rules 67(d) through (f), which relate to the imposition of  
21 “security for costs” against a class of plaintiffs who “are not the owner[s] of  
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25 <sup>1</sup> A Petition for Review in *Thiele* was filed September 11, 2013. This Petition is  
26 not intended to be a “back door appeal” or to change the result in that case.  
27 Whatever the merits of the opinion based on existing Rule 67, the rule should be  
28 amended because it unfairly impedes access to the courts.

1 property within the state” (hereinafter, the “cost bond rules”). The cost bond  
2 rules are the subject of this Petition.

3 The cost bond rules impose a “bond” requirement against a certain species  
4 of plaintiff—namely, the “non-property owing” kind. The cost bond rules are  
5 only concerned with those plaintiffs who do not own “property within the state  
6 out of which the costs could be made by execution sale.” Rule 67(d),  
7 Ariz.R.Civ.Proc.

8 Rules 67(d) and (e) impose three vague and cumbersome requirements.  
9 First, Rule 67(d) states that a court “shall” require a bond where defendant files  
10 an affidavit alleging the plaintiff is a “non-property owner within the state.” The  
11 request can come “at any time before trial,” it need not show a likelihood of  
12 prevailing on the merits, and there is no express requirement to estimate or show  
13 a basis for estimating costs.  
14

15 Second, in what is typically a separate proceeding just a few days later,  
16 Rule 67(e) provides that the court shall excuse the security requirement upon  
17 “strict proof of [a plaintiff’s] inability to give security.” The rule does not  
18 explain what is meant by “strict proof,” and fails to distinguish between persons  
19 who might be able to give some security and those who can give none. Nor does  
20 the rule distinguish between “inability” to provide security and inability to do so  
21 with significant – or even severe – hardship. The rule is therefore so vague that  
22 its application will necessarily be arbitrary. And when applied the results are  
23 draconian, since a failure to provide the ordered security requires dismissal, and  
24 may occur “without notice.” *Union Interchange, Inc. v. Benton*, 100 Ariz. 33,  
25 410 P.2d 477 (1966).  
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1 Third, if a defendant objects to the proof of inability to pay offered by a  
2 plaintiff, the rule requires the court to order the plaintiff to appear to “be  
3 examined orally” concerning the inability to post costs. *McCarthy v. Arnold*, 150  
4 Ariz. 208, 722 P.2d 376 (App. 1986). The rule makes no provision for when  
5 such an objection must be made, it make no provision for out-of-county, out-of-  
6 state, or even out-of-the-country plaintiffs, even when making such an  
7 appearance creates financial hardship or is impossible.

8 Rule 67(f) exempts certain government entities and probate executors,  
9 administrators, and guardians.

## 10 Discussion

### 11 I. The Cost Bond Rules Are Unjust, Arbitrary and Discriminatory.

12 The cost bond rules should be eliminated because they are unjust, arbitrary  
13 and discriminatory. Rule 67(d) protects only defendants for their costs.  
14 Plaintiffs get no equal protection and are, instead, financially exposed and easily  
15 subject to harassment. This is truly unfair.

16 Arizona courts have long protected *defendant’s* rights to financial privacy.  
17 *E.g., Larriva v. Montiel*, 143 Ariz. 23, 24, 691 P.2d 735, 736 (App.1984)  
18 (holding that it is necessary to make a prima facie showing of entitlement to  
19 punitive damages before being allowed to discover financial information and that  
20 “this procedure protects the defendant from an unwarranted invasion of privacy  
21 and harassment.”). Even where a plaintiff has legitimate concerns about whether  
22 a judgment against a defendant will be collectible, plaintiffs generally cannot  
23 require defendants to expose the details of their personal finances. So how can it  
24 be fair that a plaintiff can be required to bare her financial soul? Even if such  
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1 disparate treatment can survive equal protection analysis (which Petitioner  
2 doubts), this Court should not create such unfairness by rule.

3 Furthermore, Rule 67(d) makes no distinction about whether the plaintiff's  
4 case has merit, meaning that a defendant who has already harmed the plaintiff  
5 can now make it harder – or impracticable – for the plaintiff to get justice. This  
6 may result even when the defendant's misconduct, which is the subject of the  
7 suit, deprived the plaintiff of the property needed to satisfy the rule.

8 The rule secures payment of merely potential and contingent costs in favor  
9 of a particular type of litigant (defendants), who may or may not reside in  
10 Arizona, against another type of litigant (plaintiffs), who may or may not reside  
11 in Arizona. Rule 67(d) is unjustifiably one-sided.

12 Rule 67(e) requires the court to excuse those who, lacking in-state  
13 property, demonstrate that they cannot afford to post security for costs. But those  
14 who cannot provide “strict proof” of “inability,” regardless of hardship, must  
15 provide the ordered security or have their case dismissed.

16 Thus, the rules impede or practically block court access for modest-means  
17 plaintiffs, and unfairly burden plaintiffs and favor defendants.

18 Not surprisingly, most state trial court judges presented with the issue have  
19 concluded that Rules 67(d) and (e) unconstitutionally infringe upon a  
20 fundamental right to access the courts. *See* Exhibit 2 (minute entries from trial  
21 court judges). These trial court judges generally hold that, while there is some  
22 confusion over whether to apply the rational basis or strict scrutiny standards,  
23 Rules 67(d) and (e) fail constitutional muster because the cost bond requirements  
24 are “indistinguishable” from those cost bond statutes struck down by this Court  
25 in *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977).  
26  
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1 For more than thirty years since *Eastin v. Broomfield*, most defendants  
2 stopped filing motions for cost bonds, believing that Rules 67(d) and (e) were  
3 unconstitutional and (perhaps) recognizing the cost bond rules oppose basic  
4 concepts of fairness and justice. This changed in April 2013, however, when  
5 Division One published *Thiele v. City of Phoenix*, 232 Ariz. 40, 301 P.3d 206  
6 (App. 2013), an opinion in a case filed by a *pro per* plaintiff, holding Rules 67(d)  
7 and (e) were “facially constitutional” under the rational basis standard. A copy  
8 of the opinion is attached as Exhibit 3. In *Thiele*, the Court of Appeals concluded  
9 Rules 67(d) and (e) did not “unconstitutionally infringe on fundamental rights or  
10 create an invidious classification.” *Id.* at 209-10, ¶17.

11  
12 Notwithstanding Division One’s interpretation of the cost bond rules,  
13 *Thiele* upsets the well-established custom and practice in Arizona that everyone  
14 enjoys an equal and unbiased opportunity to access our civil justice system. This  
15 matter cannot and should not be left solely to the appellate process as it is already  
16 affecting civil litigants in cases where judges have said they “do not have a  
17 choice.” *See, e.g.,* Minute Entry in *Bailey v. Wilhelmsen*, Case No. CV2013-  
18 004447, Maricopa County Superior Court (September 6, 2013) (Hon. Douglas  
19 Gerlach), attached hereto as Exhibit 4. The cost bond rules create an atmosphere  
20 of invidious discrimination and undermine the public’s confidence in a fair and  
21 even-handed judicial system.

22  
23 **II. The Cost Bond Rules Impact a Huge Group of Plaintiffs and,**  
24 **When Routinely Used, Will Impose a Significant Burden on the**  
25 **Courts.**

26 This issue affects many plaintiffs. The cost bond rules are applicable to  
27 the majority of citizens in the United States who do not own property in Arizona.  
28 Under the existing cost bond rules, any plaintiff (individual or corporate) lacking

1 Arizona property can be ordered to post security. So anyone anywhere—both  
2 with Arizona and outside the state—who contracted with someone in Arizona  
3 and was been damaged even by the most egregious breach, anyone anywhere  
4 defamed by an Arizona defendant, anyone from anywhere injured by an Arizona  
5 defendant, all may now face a discriminatory bar to justice and invasion of their  
6 rights to privacy.

7 And what about non-citizens whose rights were damaged by misconduct in  
8 Arizona? What happens if a judge orders them to appear to testify about their  
9 finances and they have no money to come here? Or if they cannot appear  
10 because they can't legally enter the United States? Is it now open season on non-  
11 citizens because the cost bond rules can effectively bar the courthouse door?  
12 This kind of unfairness is inherently wrong, and will bring disrespect and  
13 disrepute upon Arizona courts and Arizona itself.

14  
15 On July 30, 2013, the United States Department of Commerce's Census  
16 Bureau released a report noting that the homeownership rate in the United States  
17 is sixty-five percent (65%). *See* Residential Vacancies and Homeownership in  
18 the Second Quarter 2013, attached hereto as Exhibit 5. But this is misleadingly  
19 high because the approximate "homeownership rate" reported by the Department  
20 is a term referring to the percentage of homes "occupied by the owner." It does  
21 not refer to the percentage of adults who "own a home." This latter percentage  
22 will be significantly lower than the homeownership rate because many  
23 households contain adult relatives who do not own their own home, and because  
24 single building multi-bedroom rental units can contain more than one adult who  
25 does not own a home. All of these people, in Arizona and around the country,  
26 who do not own property *in Arizona*, are subject to the cost bond rules.  
27  
28

1 After *Thiele* (unless the cost bond rules are changed) trial courts will likely  
2 be inundated with cost motions, many of which may require evidentiary hearings  
3 regarding the financial position of the plaintiffs, and then about the likely amount  
4 of costs defendants may incur. See *Thiele, supra* (holding it was an abuse of  
5 discretion for trial court to set cost bond without considering information  
6 regarding anticipated costs of litigation). The cost bond rules will thus burden  
7 courts and parties with collateral litigation without regard to the underlying  
8 merits of the action; *i.e.*, the likelihood that defendants will be entitled to recover  
9 costs rather than pay them to the plaintiff. The cost bond rules are unfair, and  
10 will waste limited resources.

11  
12 **III. The Cost Bond Rules Impose One-Sided Security Requirements**  
13 **Against Plaintiffs Regardless of the Likelihood of a Defendant's**  
14 **Entitlement to Costs.**

15 There are generally only two mechanisms for litigants to recover costs  
16 incurred in prosecuting or defending a lawsuit; either as a successful party under  
17 A.R.S. § 12-341 or as sanctions pursuant to Rule 68, Ariz.R.Civ.P. Under both  
18 provisions, the party attempting to recover costs must establish some degree of  
19 “success” in the lawsuit.

20 The cost bond rules, however, require a plaintiff to post security merely by  
21 a defendant’s asserting the plaintiff lacks property within the State of Arizona.  
22 The cost bond rules are blind to whether a defendant will actually be entitled to  
23 recover costs; they are solely concerned with whether the plaintiff owns property  
24 in Arizona. The rules allow even obviously liable defendants to discourage or  
25 impede court access.

26 Consider, for example, a plaintiff injured in a rear-end motor vehicle  
27 collision. In the ensuing lawsuit, the defendant admits liability and that the sole  
28



1 dispute is the full extent of damages. The plaintiff, however, does not own  
2 property in the State of Arizona, and in the action, the anticipated costs exceed  
3 \$5,000.00.<sup>2</sup> In an attempt to prevent or unfairly discourage the plaintiff from  
4 bringing his claim to trial, the defendant seeks a cost bond under Rule 67(d). In  
5 the event the plaintiff is not indigent, but is unable to secure financing for the  
6 cost bond, the court must dismiss the case despite the fact the plaintiff possesses  
7 a meritorious claim and the defendant has zero entitlement to recover its costs.  
8 Such a result is unconscionable, but is freely permitted under the cost bond rules  
9 because security can be required without regard to the merits of the case.  
10

#### 11 **IV. There is No Marketplace for Cost Bonds.**

12 Although the title to Rule 67(d) refers to “bond and conditions,” there is no  
13 such thing as a cost bond available to the ordinary person. An Internet search will  
14 turn up companies willing to sell more than a dozen kinds of surety bonds, but no  
15 reference to a bond for court costs. The lack of cost bonds in the marketplace  
16 makes commercial sense. An appearance bond for a criminal defendant is  
17 exonerated if the defendant appears, but still requires collateral to cover the fact  
18 amount of the bond and typically a nonrefundable fee of 10% of the bond amount.  
19 If a civil plaintiff has Arizona collateral she is not required to post security. And  
20 no bonding company would stay in business posting litigation bonds without both  
21 significant fees and overwhelming security. There may be some mechanism out  
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25 <sup>2</sup> This is not really a hypothetical situation. In fact, under very similar  
26 circumstances, a defendant recently sought such a bond against the plaintiff in  
27 *Thomas v. Quintana*, Case No. C20115806, Pima County Superior Court. See  
28 Response to Motion for Security for Costs in *Thomas v. Quintana*, attached  
hereto as Exhibit 6.

1 there to obtain such a bond, but getting one is both beyond the ken and beyond the  
2 resources of almost everyone.

3 So, as a practical matter, a plaintiff ordered to post security under Rule 67  
4 must deposit cash with the clerk of court or be dismissed from the courthouse.

5 **V. The Cost Bond Rules Are Unnecessary Since Protections**  
6 **Already Exist To Protect Defendants And Ensure**  
7 **The Collectability Of Costs.**

8 Petitioner can conceive only two legitimate purposes for Rules 67(d) and  
9 (e): (1) to protect defendants from frivolous lawsuits and (2) to ensure  
10 defendants are able to recover costs in the event they are the successful party.  
11 Arizona law and the Rules of Civil Procedure, however, already provide ample  
12 protection for defendants.

13 A.R.S. § 12-341 protects a prevailing defendant by providing an  
14 entitlement to recover costs. Yet, A.R.S. § 12-349 goes even further and permits  
15 a defendant to recover not only costs, but attorney's fees and double damages for  
16 frivolous claims or abuses of the discovery process. Finally, Rule 11 of the  
17 Arizona Rules of Civil Procedure provides an effective and judicious manner for  
18 litigants to dispose of frivolous lawsuits based upon the merits of the case, rather  
19 than the "ownership status" of the respective parties.  
20

21 With regard to ensuring defendants are able to collect costs from a  
22 plaintiff, the cost bond rules are ineffective and unfairly provide additional rights  
23 to defendants that are not afforded to plaintiffs. First, the mere fact a plaintiff  
24 owns property does not make a judgment collectible. In fact, the judgment does  
25 not even attach as a lien against property, and even if it did, it could not be used  
26 to force a sale of the property because of the homestead exemption available in  
27  
28

1 Arizona. Yet, such plaintiffs are not required to post a cost bond while non-  
2 property owning plaintiffs must post a bond.

3 Second, the successful party in litigation is permitted to recover their  
4 taxable costs in a lawsuit, not just defendants. In the event a defendant fails to  
5 pay a judgment, a plaintiff's recourse for executing on the judgment is to pursue  
6 collections and potentially judicial remedies. This "recourse" has long been held  
7 to be sufficient to ensure a plaintiff's right to execute a judgment.

8 Why should defendants be entitled to additional remedies and protections  
9 not afforded to plaintiffs? Are plaintiffs not entitled to the same certainty in their  
10 recovery as defendants? Is the State of Arizona proclaiming defendants are more  
11 collectible than plaintiffs and therefore no protection is needed? The cost bond  
12 rules answer these questions in affirmative creating a result where certain classes  
13 of litigants are treated differently based upon their property "ownership status"  
14 within the state. This is overtly discriminatory and the State of Arizona's judicial  
15 system should not continue to adhere to rules that favor one party over the other.  
16

17 **VI. The Cost Bond Rules are Unconstitutional and *Thiele* is**  
18 **Incorrect.**

19 The foregoing discussion is based upon Petitioner's contentions that,  
20 regardless of the constitutionality of the cost bond rules, such one-sided,  
21 discriminatory provisions do not conform to the high standards of practice in  
22 Arizona that value unbiased and unimpeded access to the courts. Petitioner  
23 would be remiss, however, to not also point out that the cost bond rules fall  
24 below constitutional standards that require unbiased and unimpeded access to the  
25 courts.  
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1        Though not addressed in *Thiele*, the confusion over whether to apply the  
2 rational basis or strict scrutiny standard was noted over 24 years ago by Judge  
3 Barry Schneider in *Haschak v. McKinley*, CV1987-34896, Maricopa County  
4 Superior Court. In that case, Judge Schneider observed the tension between  
5 *Tahtinen v. Superior Court*, 130 Ariz. 513, 637 P.2d 723 (1981), which upheld  
6 the constitutionality under the “rational basis test” of “filing fees” applied to all  
7 litigants and *Eastin*, which struck down a “cost bond” statute, virtually identical  
8 to Rules 67(d) and (e), applied to only certain classes of litigants.

9        Judge Schneider recalled the discussion in *Tahtinen* that “the cost bond  
10 statute in *Eastin* did not have a “rational basis” and contrasted that with *Kenyon*  
11 *v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984), which observed that “*Eastin* . . .  
12 stands for the proposition that where the fundamental right to bring or pursue the  
13 action is affected, the court *will not apply the rational basis analysis.*” *Id.* at 83,  
14 688 P.2d at 975 (emphasis added). Despite this distinction, Judge Schneider held  
15 that, under any standard, Rules 67(d) and (e) would be unconstitutional,  
16 explaining:  
17

18            [A]s to indigents, even assuming the rational basis test  
19 applies, the rule violates the privileges and immunities  
20 clause by denying access to the courts. As to non-  
21 indigents, the rules do not permit a non-indigent  
22 plaintiff from the requirement of posting a bond unless  
23 the plaintiff owns property in Arizona. Since there is  
24 no authority in the trial court to relieve a non-indigent  
25 who owns no property in Arizona from posting a bond,  
26 the rule violates the privileges and immunity clause  
27 because, as in *Eastin*, it places a heavier burden upon  
28 access to the court.

None of these issues—the uncertainty as to which test to apply or the application  
of the rules to different classes of plaintiffs—were discussed in *Thiele*.

1                   **A. The Cost Bond Rules Unlawfully Discriminate between Plaintiffs**  
2                   **and Defendants in Violation of the Equal Protection Clause.**

3                   The Fourteenth Amendment to the United States Constitution provides that  
4 no State shall “deny to any person within its jurisdiction the equal protection of  
5 the laws.” U.S. Const. Amend. XIV, § 1. The Arizona Constitution also contains  
6 an Equal Protection Clause. *See* Ariz. Const. art. 2, § 13 (“No law shall be  
7 enacted granting to any citizen, class of citizens, or corporation other than  
8 municipal, privileges or immunities which, upon the same terms, shall not  
9 equally belong to all citizens or corporations.”). Its reach is co-extensive with  
10 that of the federal guarantee. *See Westin Tucson Hotel Co. v. State Dept. of*  
11 *Revenue*, 188 Ariz. 360, 936 P.2d 183, 189 (App. 1997).

12                  Courts utilize several tests to determine the constitutionality of legislation  
13 and court rules that create such classifications. Generally, they are referred to as  
14 the (1) rational basis test and (2) the strict scrutiny test. The rational basis test,  
15 the least restrictive test, will uphold imposing burdens on one class, but not the  
16 other, if a legitimate state interest is served by the rule, and the facts permit the  
17 court to conclude the classification rationally furthers the state’s legitimate  
18 interest. In Arizona, courts have held other rules and statutes similar to Rules  
19 67(d) and (e) do not even meet the rational basis test, let alone the more  
20 restrictive strict scrutiny analysis. *See Tahtinen v. Superior Court*, 130 Ariz. 513,  
21 637 P.2d 723 (1981).

22                  In *Tahtinen*, the court held:  
23

24                         The cost bond statutes in [*Eastin v. Broomfield*, 116  
25 Ariz. 76, 570 P.2d 744 (1977) (requiring that the party  
26 who lost a medical malpractice panel proceeding post a  
27 \$2,000.00 bond in order to continue to proceed with the  
28 litigation)] and [*New v. Ariz. Bd. of Regents*, 127 Ariz.

68, 618 P.2d 238 (1980) (requiring plaintiffs to post a cost bond in any contract or negligence action brought against the state)] did not have a rational basis. The purpose of the statutes was to deter frivolous litigation. The frivolity *vel non* of litigation not related to the financial status of the litigants. By denying access to the courts to indigents with meritorious claims and granting it to the wealthy with frivolous claims, the bond provisions of the statutes were grossly overinclusive and underinclusive. The defects were so great it cannot rationally be said they rationally furthered a legitimate legislative purpose.

*Id.* at 515, 637 P.2d at 725.

In this instance, Rules 67(d) through (f) discriminate between several different classes of individuals: (1) plaintiff who own property and those who do not own property; (2) plaintiffs with means to post security and those without the means to do so; (3) between plaintiffs and defendants; and (4) between plaintiffs and exempted public entities as well as executors, guardians and administrators. *See* Ariz.R.Civ.P. 67(d), (e), (f). And, just like the cost bond statute in *Eastin*, the cost bond rules deny access to the courts to indigents with meritorious claims and grant it to the wealthy with frivolous claims. The cost bond rules here are similarly “overinclusive and underinclusive” without any rational basis.

**B. The Cost Bond Rules Violate the Privileges and Immunities Clause by Creating an Undue Burden on Plaintiffs in Accessing the Courts.**

“Strict scrutiny applies when the legislation impinges upon a fundamental right or discriminates based upon suspect classification.” *Lerma v. Keck*, 186 Ariz. 228, 232, 921 P.2d 28, 32 (App. 1996). Under the Arizona Constitution, individuals have a fundamental right to bring and pursue an action for damages. *See* Ariz. Const. art. 2, § 13 (“No law shall be enacted granting to any citizen,

1 class of citizens, or corporation other than municipal, privileges or immunities  
2 which, upon the same terms, shall not equally belong to all citizens or  
3 corporations.”); *see also Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984).  
4 The cost bond rules, however, require dismissal of a plaintiff’s action for failure  
5 to post a cost bond and therefore impinge upon the fundamental right to bring  
6 and pursue an action for damages. Thus, to pass constitutional muster, Rules  
7 67(d) and (e) must be necessary to achieve a compelling state interest. *See*  
8 *Kenyon*, at 78, 688 P.2d at 970.

9 Here, there is simply no state interest, compelling or otherwise, in ensuring  
10 the collectability of costs from litigants. *See Haschak v. McKinley, M.D.*, Case  
11 No. CV1987-34896, Maricopa County Superior Court (June 2, 1989) (Hon.  
12 Barry C. Schneider) (holding that ensuring collectability of costs is not  
13 compelling). Even assuming *arguendo* such an interest exists, the onerous and  
14 arbitrary requirements of Rules 67(d) and (e) are unnecessary as litigants have  
15 sufficient alternative protections in place to protect from frivolous lawsuits and to  
16 collect from debtors.

### 17 18 **Conclusion**

19 For the foregoing reasons, Petitioner asks this Court to amend Rule 67 of  
20 the Arizona Rules of Civil Procedure. Specifically, Petitioner requests the Court  
21 adopt the proposed language in Exhibit 1.  
22

23 **RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of September, 2013  
24

25 **LEVENBAUM TRACHTENBERG, PLC**  
26

27 /s/ Geoffrey M. Trachtenberg, Esq.  
28 Geoffrey M. Trachtenberg

## **EXHIBIT 1**



Proposed Amendment to Rule 67 of the Arizona Rules of Civil Procedure

(Additions are shown underlined and deletions are shown ~~stricken~~.)

**Rule 67 Deposit in court; ~~security for costs~~**

**(a) By leave of court**

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing.

**(b) By order of court**

When it is admitted by pleading or examination of a party that the party has in the party's possession, or under the party's control money or other things capable of delivery which are the subject of the litigation, and held by the party as trustee for another party, or which belong or are due to another party, the court may order the money or things to be deposited in court or delivered to such party upon such conditions as may be just and subject to the further order of the court.

**(c) Custody; duties of clerk**

Where any money, debt, instrument of writing or other article is paid or deposited in court to abide the result of legal proceedings, the clerk shall seal the article in a package, and deposit it in a safe or bank, subject to the control of the court, and enter in the records of the action a statement showing each item of money or property received, and the disposition thereof. If the deposit is money the court may order the clerk to deposit it with the county treasurer, who shall receive and hold it subject to the order of the court.

**(d) ~~Security for costs; when required; bond and conditions~~**

~~At any time before trial of an issue of law or fact, on motion of the defendant, supported by affidavit showing that the plaintiff is not the owner of property within the state out of which the costs could be made by execution sale, the court shall order the plaintiff to give security for the costs of the action. The court shall fix the amount of the security, the time within which it shall be given and it shall be given upon condition that the plaintiff will pay all costs that may be adjudged against the plaintiff, and authorize judgment against the sureties, if a written undertaking. If the plaintiff fails to do so within the time fixed by the court, the court shall order the action dismissed without notice.~~

~~(e) Inability to give security; proof; objection and examination~~

~~If the plaintiff, within five days after the order, makes strict proof of inability to give the security, the order to give security shall be vacated. The proof may be made by affidavit, but if objection thereto is made by the defendant, the plaintiff shall submit to the court at a time designated by the court, when the plaintiff shall be examined orally as to the inability to give such security.~~

~~(f) Exemptions; exceptions~~

~~1. The following shall not be required to give security for costs:~~

- ~~i. The state.~~
- ~~ii. The county.~~
- ~~iii. A board of commission of the state or county, or an officer of such board or commission acting in an official capacity.~~
- ~~iv. An Executor, administrator or guardian appointed under the laws of this state.~~

~~2. When the costs are secured by an attachment bond or other bond no further security shall be required.~~

~~3. An intervener, and a defendant seeking judgment against the plaintiff on a counterclaim, though the plaintiff has discontinued the plaintiff's action, shall be required to give security as is required of a plaintiff.~~

## **EXHIBIT 2**

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. CARMINE CORNELIO

CASE NO. **C-20120899**

DATE: March 6, 2013

CURTIS MERRITT  
Plaintiff

VS.

CITY OF TUCSON and  
DOWNTOWN TUCSON PARTNERSHIP, INC  
Defendants

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**R U L I N G**

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**IN CHAMBERS: MOTION FOR SECURITY COSTS:**

The Court has considered the briefs and arguments of counsel.

In this case, the Defendant is seeking an Order under Rule 67(d). In that order, the Defendant seeks a requirement that Plaintiff post a bond, and if the Plaintiff fails to post a bond, a dismissal. Under the rule, if, upon application of the Plaintiff he demonstrates “strict proof of inability to give a security” this Court can vacate its order requiring the posting of the bond and dismissal.

The Plaintiff contests the constitutionality of this rule. Despite the rule’s “venerable” history,<sup>1</sup> there is no published Arizona decision either found by this Court or briefed by the parties that addresses the constitutionality of the rule. However, at least one state has found a somewhat similar rule (or statute) unconstitutional. See *Patrick v. Lynden Transport*, 765 P.2d 1375 (1988). The *Patrick* case held the Alaska statute unconstitutional because there was no mechanism for a Plaintiff to avoid the bond requirement. Arizona’s rule has such a mechanism, so the *Patrick* holding is not applicable. The case does stand for the proposition, however, that rules/statutes as to cost bonds must pass constitutional muster.

This Court believes that the rule is discriminatory. It appears to apply only to Plaintiffs and only to Plaintiffs who (whether state residents or not) do not own property within the state out of which cost could be paid by execution sale.

This leaves out Plaintiffs with sufficient in state property and all Defendants (potentially even those who

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<sup>1</sup> In fact, the rule is based on a former 1901 statute. See *Miami Copper v. Strohle*, 130 P 605 (1913).

## RULING

are Plaintiffs by way of counterclaim).<sup>2</sup>

The rule benefits one side (Defendant) over the other (Plaintiff). It places additional steps, motions, and hearings and disclosure of financial status on one but not the other.

A non-property owning Plaintiff can, of course, demonstrate “strict proof” of inability to post a bond. Therefore, access to the courts for indigents is not (impermissibly) barred. This does not, as the Defendant here posits, necessarily make the rule “self-constitutionalizing” A non-property-owning Defendant who may have made necessary the filing of the suit by Plaintiff need make no such financial showing so as to avoid a costs bond.

It is this Court’s observation that sometimes Plaintiffs are right and sometimes they are wrong. Same is true with Defendants. It is also true that it is sometimes the conduct or position of a Defendant that makes the filing of suit necessary. A rule favoring one over the other is inherently unfair and unequal. There seems to be no compelling (or rational) state interest in such favoritism.

Accordingly, this Court finds the rule unconstitutional and denies the Defendant Downtown Partnership’s Motion for Security for Costs.

cc: Hon. Carmine Cornelio  
Darren M Clausen, Esq.  
Daryl A Audilett, Esq.  
David R. Penilla, Esq.  
Erik B. Ryberg, Esq.  
Kevin M Moore, Esq.  
Nathan T. Metzger, Esq.  
Perry E Casazza, Esq.  
Clerk of Court - Under Advisement Clerk

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<sup>2</sup> A court could potentially “read” Rule 13 (regarding counter claims) and 67 to avoid this result by “interpreting” a counterclaimant to be a Plaintiff.

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KENNETH LEE

CASE NO. C20110055

DATE: December 04, 2012

ROBERT A FORSHAW  
Plaintiff

VS.

VIRTUAL RADIOLOGIC CORPORATION and  
JAIME MANUAL SHEPERD MD  
Defendants

---

**O R D E R**

---

**IN CHAMBERS ORDER RE DEFENDANTS' MOTION TO REQUIRE PLAINTIFF TO POST  
SECURITY FOR COSTS**

The Defendants have filed a Motion to Require the Plaintiff to Post Security for Costs, pursuant to Rule 67(d), Arizona Rules of Civil Procedure. Under this Rule a Defendant may request that the Plaintiff be required to give security for costs, if the Plaintiff is not the owner of property within the state out of which costs awarded to the Defendant could be recovered. If within five days of a Court order requiring the giving of such security for costs, a Plaintiff gives strict proof of an inability to give such security, the Order requiring the security shall be vacated. Rule 67 (e), Arizona Rules of Civil Procedure.

The Defendants are requesting an Order from the Court that requires the Plaintiff to give \$25,000.00 to secure the potential costs that could be incurred by Defendants. The Defendants request is supported by the required Affidavit. The Affidavit is made by Defendants' counsel that asserts that in the discovery responses the Plaintiff identities no real property that is owned in Arizona. The Affidavit also states, without any support, that the Defendants' costs could be in excess of \$25,000.00.

The Plaintiff responds by claiming Rule 67(d) and (e) are unconstitutional, as they violate the equal protection and the due process clauses of the United States and Arizona Constitutions. Plaintiff further asserts they violate the privileges and immunity clauses of the Arizona Constitution, Article 2, Section 13. The Plaintiff does not indicate whether he is able or unable to give security in the requested amount. At this point, the Plaintiff is not required to make such a declaration. The Plaintiff provides copies of several Minute Entry Orders from other Arizona Superior Court Judges who have ruled that Rule 67(d) and (e) are unconstitutional.

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Mary Ann Ritz  
Judicial Administrative Assistant

## ORDER

These Minute Entries have no precedential value and the Plaintiff has so acknowledged. Plaintiff indicates these are being submitted only for their persuasive value as to the reasoning of these other courts. In particular the June 2, 1989 Order of the Honorable Barry Schneider in the case of Haschak v. McKinley, CV87-34896, is the only one that provides an analysis of the constitutionality of Rule 67 in its present form. This was attached as Exhibit 4 to the Plaintiff's Response.

In Defendants' Reply, the constitutional argument is not addressed directly. Defendants cite several old Arizona cases that have not found Rule 67(d) and (e) unconstitutional. However, the cases cited by Defendants relate to an earlier version of the Rule that distinguished between resident and non-resident Plaintiffs. In these cases the Arizona Supreme Court did not directly address the constitutionality of the Rule. In Wright v. Sears Roebuck, 116 Ariz. 391, 569 P.2d 827 (Ariz., 1977), the Arizona Supreme Court found the Plaintiff did not have standing to challenge the constitutionality of the then existing Rule, that provided for an indigency exception for a resident but not for a non-residents, because the Plaintiff was a non-resident who was able to post the ordered security but was late in doing so. In Union Interchange, Inc. v. Benton, 800 Ariz. 33, 410 P.2d 477 (Ariz., 1966), the Arizona Supreme Court did not consider the constitutionality of the Rule. The Plaintiff did not file the security for costs within the time specified by the trial court. The issue before the Arizona Supreme Court was not the constitutionality of the Rule, but rather the timeliness of the Plaintiff's actions in light of the order that the Plaintiff provide security for costs. Finally, in Flynn v. Johnson, 3 Ariz. App. 369, 414 P.2d 757 (1966), the Arizona Court of Appeals was addressing an older version of the Rule that distinguished between resident and non-resident Plaintiffs. The constitutional issue was not raised before the trial court and the appellant court would not entertain an issue that was being raised for the first time on appeal. None of the cases cited by the Defendants ever considered the constitutionality of the Rule.

On the record before this Court, the Plaintiff's constitutionality arguments have been effectively left unchallenged by the Defendants. The cases cited by the Defendants related to an earlier version of the Rule and the Courts in those cases did not consider the constitutionality of the Rule. The Court also finds persuasive Judge Schneider's analysis constitutionality of the present Rule 67(d) and (e).

IT IS ORDERED that the Defendants' Motion for Security for Costs is denied.

cc: Hon. Kenneth Lee  
Carolyn G (Armer) Holden, Esq.  
Linda P. McKenzie, Esq.  
Scott A. Holden, Esq.  
W Daniel Shelton, Esq.

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Mary Ann Ritz  
Judicial Administrative Assistant

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FILED  
2012 OCT 16 AM 11:03  
LYNN FAZZ  
CLERK OF SUPERIOR COURT  
YUMA ARIZONA 85304

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YUMA

CONRAD BECKER, surviving spouse of )	CASE NO.: S1400CV201001064
Abbie Becker, for and on behalf of )	DIV. III ( <i>Hon. Lawrence C. Kenworthy</i> )
Himself, Samuel Becker, and Conra Lea )	
McMutrey, the statutory beneficiaries of )	
Abbie Becker, deceased, )	
)	
Plaintiff, )	
)	
Vs. )	ORDER
)	
ANN MARIE HALADA, M.D., and )	
ARIJIT CHOWDHURY, wife and )	
Husband; HOSPITALIST OF YUMA, )	
P.L.L.C., an Arizona professional )	
Corporation; KIRK MINKUS, M.D. and )	
JANE DOE MINKUS, husband and wife; )	
THE MEDICAL DIAGNOSTIC )	
IMAGING GROUP, LT., and Arizona )	
Corporation; DOES I-V, )	
)	
Defendants. )	

Pending before the court is Defendant's Motion to Require Plaintiff to Post Security.  
Having reviewed the Parties Briefs the court finds and orders as follows.  
Rule 67(d) requires only a Plaintiff to post security. It does not require statutory  
beneficiaries to post security. Thus, the court will not consider the ability of the beneficiaries to  
post security.



1 Plaintiff offers evidence from his deposition that he cannot afford to post security.  
2 Defendant has objected to this evidence, arguing that pursuant to Rule 67(e), Plaintiff's inability  
3 to give security becomes ripe only after entry of an order that security be posted. Since there has  
4 been no security ordered, nor an in court examination of Plaintiff's inability, the court lacks  
5 authority to deny the motion based on Plaintiff's inability.

6 Plaintiff also objects to the court ordering security, arguing Rule 67(d) is unconstitutional  
7 as applied to him. Plaintiff is a resident of Idaho. The statute appears to make a classification of  
8 Plaintiffs who reside in Arizona, and those who are nonresidents. That classification restricts  
9 nonresident's access to Arizona courts. The decision in Patrick v Lynden Transport 765 P 2d  
10 1375 (Ak. 1988) is persuasive for the proposition that a rule or statute which has the practical  
11 effect of restricting access to Arizona courts for nonresidents infringes on a person's  
12 constitutional right to equal protection. When the Rule is applied to Plaintiff herein, it is  
13 unconstitutional. Accordingly,

14 IT IS ORDERED denying Defendant's Motion to Require Plaintiff to Post Security for  
15 Costs.

16 Dated this \_\_\_\_\_ day of October, 2012.

17  
18  
19 JUDGE OF THE SUPERIOR COURT  
20  
21

22 Copy of the foregoing Order  
23 Mailed this 10th day of  
24 October, 2012, to:

25 Brian Snyder, Esq.  
26 Howard Snyder, Esq.  
27 SNYDER & WENNER, P.C.  
28 2200 East Camelback Road, Suite 213  
Phoenix, Arizona 85016  
Attorneys for Plaintiff

1 DeeDee Armer Holden, Esq.  
2 Scott A. Holden, Esq.  
3 HOLDEN & ARMER, P.C.  
4 6101 South Rural Road, Suite 112  
5 Tempe, Arizona 85383  
6 Attorneys for Defendants *Hospitalists of Yuma, PLLC*  
7 *And Dr. Hulada*

8 Patrick D. White, Esq.  
9 THE CAVANAGH LAW FIRM  
10 1850 N. Central Avenue, Suite 2400  
11 Phoenix, Arizona 85004  
12 Attorneys for Defendants *Kirk Minkus, M.D. and*  
13 *The medication Diagnostic Imaging Group, Inc.*

14 LYNN FAZZ, CLERK OF THE SUPERIOR COURT

15 By: ELIZABETH ALDANRA  
16 Deputy Clerk  
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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

\*\*\* FILED \*\*\*  
11/05/2002

10/31/2002

CLERK OF THE COURT  
FORM V000A

HON. MICHAEL J. O'MELIA

A. Beery  
Deputy

CV 2002-006928

FILED: \_\_\_\_\_

SYLVIA JUSLIN, et al.

BRIAN T ALLEN

v.

THE MILLS CORPORATION, et al.

CHRISTINA URIAS

PAUL W HOLLOWAY

MINUTE ENTRY

The Motion for Costs is denied. Rule 67(d) is unconstitutional.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2003-017536

01/06/2005

HONORABLE KENNETH L. FIELDS

CLERK OF THE COURT  
D. Whitford  
Deputy

FILED: 01/07/2005

NICOLE FORD

WINTON DERUYTER WOODS III

v.

JOHN J COREY, et al.

PAUL M BRIGGS

JAMES R BROENING

**RULING**

The Court has under advisement the defendant Healthsouth Surgery Center of Scottsdale's Motion for Security of Costs. The Court denies the motion after consideration of the pleadings. The Court agrees with Judges Schneider and O'Melia that the application of Rule 67 here would be unconstitutional.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-017516

03/21/2006

HONORABLE BARRY C. SCHNEIDER

CLERK OF THE COURT  
B. Navarro  
Deputy

FILED: 03/23/2006

STEVEN MAGLIO

GEOFFREY M TRACHTENBERG

v.

MICHAEL MCNEIL, et al.

KEITH R RICKER

**MINUTE ENTRY**

The court has received Defendants' Motion for Security for Costs, Plaintiff's Response and Defendants' Reply. No oral argument has been requested.

This court has previously ruled that Rules 67(d) and (e), Ariz.R.Civ.P. are unconstitutional. That ruling can be found in this court's minute entry ruling of June 2, 1989 in *Haschak v. McKinley*, Maricopa County Cause number CV 87-34896. A copy of that minute entry is filed in this cause and copies are mailed to the parties by court staff.

This court still holds the same position.

IT IS ORDERED DENYING Defendants' Motion for Security for Costs.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2007-000190

03/17/2008

HON. EDWARD O. BURKE

CLERK OF THE COURT  
L. Nixon  
Deputy

PABLO ZAMORA

GEORGE E MUELLER

v.

IDELA HAWKINS, et al.

GARRICK MCFADDEN

NANCY M BONNELL

MINUTE ENTRY

The Court has received and reviewed Defendants' Motion for Security for Costs and Plaintiff's Response.

IT IS ORDERED Defendants' Motion for Cost Bond is DENIED. Rule 67(d) is unconstitutional. Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977).

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2008-002257

10/08/2008

HON. EDWARD O. BURKE

CLERK OF THE COURT  
L. Nixon  
Deputy

LARRY G MARTIN SR.

GEOFFREY M TRACHTENBERG

v.

PHILLIPS & ASSOCIATES LAW OFFICES P C, JOHN A ELARDO  
et al.

MINUTE ENTRY

The court, having received and reviewed Defendant's Motion for Cost Bond, Plaintiff's Response to Motion for Cost Bond, and Defendant's Reply to Response to Motion for Cost Bond, enters the following ruling.

Defendant's Motion for Cost Bond is DENIED.

Defendant asks the court, pursuant to Arizona Rule of Civil Procedure 67(d), to have Martin post a bond for at least \$10,000 to cover costs should a verdict be returned for Defendant. Martin states he does not have the funds to post a cost bond. If the court were to require Martin to post the cost bond as a condition of continuing this litigation and he could not do so, Martin's right of access to the court would be restricted. Eastin v. Broomfield, 116 Ariz. 576, 586, 570 P.2d 744, 754 (1977). Rule 67(d) creates a division between the people who can afford to post a bond and continue litigation and the people who cannot afford the bond to continue litigation.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MOHAVE

Danna D. Hendrix, Judge

Division 1

Date: June 12, 2008

Jenni Wiedmann, Judicial Assistant 

WENDY and SCOTT RUSSELL, wife and husband, )

Plaintiffs, )

vs. )

Case No. CV 2005-1467

LAKE HAVASU IMAGING CENTER, INC., an )  
Arizona corporation; A. NICOLAS AWAD, M.D. )  
and JANE DOE AWAD, husband and wife, )

Defendants. )

ORDER

RE: DEFENDANT'S MOTION DENIED

The Court having reviewed:  
April 28, 2008

May 8, 2008  
May 21, 2008

Defendant's Motion to Require Plaintiffs  
to Post Security for Costs,  
Plaintiff's Response,  
Defendant's Reply,

IT IS ORDERED denying the motion. The Court agrees with Judges Schneider and O'Melia that application of Rule 67 would be unconstitutional.

  
cc: Robert N. Edwards, 2105 3rd Ave., # 300, Anoka MN 55303  
Matthew L. Cates 201 E. Washington St. Phoenix, AZ 85004-2385



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REMANDS	
GEN ACCTG.	

SUPERIOR COURT OF ARIZONA,  
MARICOPA COUNTY

CLERK OF THE COURT

June 2, 1989  
Code                      Date

HON. BARRY C. SCHNEIDER  
Judge / Commissioner / Pro Tem

I.E. Garcia  
Deputy

CV 87-34896

BARBARA HASCHAK

Howard M. Snyder

VS

David A. Wenner

WILLIAM W. MCKINLEY, M.D., et al

Janet Kornblatt

The court has had under advisement defendant's motion for security for costs and has considered the issues raised in the motion including the constitutional issues raised in the response to the motion and in the supplemental briefing.

The court is of the opinion that Rules 67(d) and (e), Arizona Rules of Civil Procedure, are unconstitutional. The court is of the opinion that the holding in Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) compels this conclusion.

In Eastin, a provision of the medical malpractice act which required that the party who lost the panel proceeding post a \$2,000 bond in order to continue to proceed with the litigation was held to be constitutionally infirm under the privileges and immunities clause of the Arizona Constitution contained in Article II, §13. Justice Cameron held that the statute as to

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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

June 2, 1989

HON. BARRY C. SCHNEIDER

CLERK OF THE COURT  
I.E. Garcia  
Deputy

Code

Date

Judge/Commissioner/Pro Tem

CV 87-348,6

HASCHAK vs. McKINLEY, M.D., et al

Cont'd:

indigents violated the privileges and immunities clause by denying access to the courts and, as to non-indigents, it violated the same provision by placing a heavier burden upon access to the court.

There seems to be some confusion as to whether the test applied in Eastin was the strict scrutiny test or the rational basis test. In Tahtinen v. Superior Court, 130 Ariz. 513, 637 P.2d 723 (1981), Justice Gordon upheld the constitutionality of statutes that require the paying of a fee to file a civil action or civil appeal. In the course of the opinion Justice Gordon discussed and distinguished Eastin. He observed that the cost bond statute in Eastin did not have a rational basis. By contrast, Justice Gordon did hold that the statutes involved in Tahtinen requiring the payment of a filing fee did have a rational basis and were therefore constitutional. The rational basis was to provide for the recouping of the administrative costs of opening the courts to litigants.

In Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984), Eastin was also discussed. In Kenyon the issue was whether the

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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

June 2, 1989  
Code Date

HON. BARRY C. SCHNEIDER  
Judge/Commissioner/Plu Tent

CLERK OF THE COURT  
I.E. Garcia  
Deputy

CV 87-34896

HASCHAK vs. MCKINLEY, M.D. et al

Cont'd:

statute of limitations contained in the medical malpractice act was constitutional. The statute, A.R.S. §12-564(A), provided that a cause of action for medical malpractice against a licensed health care provider accrued as of the date of the injury and was barred if not filed within three years. Justice Feldman, in an opinion concurred in by Justice Cameron, the author of Eastin, held that a fundamental right under Article 18, § 6 of the Arizona Constitution was at stake and the proper test was the strict scrutiny test. In discussing the Eastin case, Justice Feldman observed as follows:

Eastin therefore stands for the proposition that where the fundamental right to bring or pursue the action is affected, this court will not apply the rational basis analysis.

Kenyon, supra at 83, 688 P.2d at 975.

If the strict scrutiny test is to be applied this court is of the opinion that there can be no doubt as to the unconstitutionality of Rules 67(d) and (e). The strict scrutiny test is the strictest test, or the most difficult test from

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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CLERK OF THE COURT

June 2, 1989  
Code Date

HON. BARRY C. SCHNEIDER  
Judge/Commissioner/Pro Tem

I.E. Garcia  
Deputy

CV 87-34896

HASCHAK vs. MCKINLEY, M.D., et al

Cont'd:

the perspective of upholding the constitutionality of legislation. Under this test a discriminatory statute is upheld only if there is a compelling state interest to be served and the regulation is necessary to achieve that objective.

The state interest identified by defendants in support of the constitutionality of the rules is that the purpose of the rules is to ensure collectability of costs against plaintiffs who do not own property in Arizona. It is the opinion of this court that such a purpose is not compelling. Accordingly, under the strict scrutiny test, Rules 67(d) and (e) do not pass constitutional muster.

If we assume, as was apparently done in Tahiten, that the holding in Eastin was based on a rational basis test, the conclusion that Rules 67(d) and (e) are unconstitutional is nonetheless inescapable. That is because this court finds the statute in question in Eastin to be indistinguishable from Rules 67(d) and (e). Defendant argues that there is a distinction. They argue that the bond provided for in the medical practice statute provided for a fixed amount and was not waivable. As

(Cont'd:)

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GEN. ACCTG.	

**SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY**

CLERK OF THE COURT

June 2, 1989  
Code                      Date

HON. BARRY C. SCHNEIDER  
Judge/Commissioner/Pro Tem

I.E. Garcia  
Deputy

CV 87-34896

HASCHAK vs. MCKINLEY, M.D., et al

Cont'd:

pointed out, however, in New v. Arizona Board of Regents, 127 Ariz. 68, 618 P.2d 238 (Ct. App. 1980) the statute in Eastin expressly authorized the presiding judge to reduce the bond upon a showing of indigency or other just cause. The power vested in the presiding judge by that statute is similar to the power vested in the trial judge under Rule 67(e), at least as far as indigents are concerned. The safety net in that statute did not save the medical malpractice statute from constitutional infirmity in Eastin. Similarly, it does not save the rules from a similar demise. Thus, as to indigents, even assuming the rational basis test applies, the rule violates the privileges and immunity clause by denying access to the courts. As to non-indigents, the rules do not permit a non-indigent plaintiff to obtain relief from the requirement of posting a bond unless the plaintiff owns property in Arizona. Since there is no authority in the trial court to relieve a non-indigent who owns no property in Arizona from posting a bond, the rule violates the privileges and immunity clause because, as in Eastin, it places a heavier burden upon access to the court.

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REMANDS	
GEN ACCTG.	

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

June 2, 1989

HON. BARRY C. SCHNEIDER

CLERK OF THE COURT

I.E. Garcia

Case

Date

Judge/Commissioner/Pro Tem

Deputy

CV 87-34896

HASCHAK vs MCKINLEY, M.D., et al.

Cont'd:

Since it is the opinion of the court that the privileges and immunities issue is dispositive of the constitutional issue, the court declines to consider plaintiff's due process argument.

IT IS ORDERED DENYING the motion.

## **EXHIBIT 3**

**C**

Court of Appeals of Arizona,  
Division 1, Department E.  
James **THIELE**, Plaintiff/Appellant,  
v.  
CITY OF PHOENIX, a municipal Corporation; Michael Simmons, Defendants/Appellees.

No. 1 CA-CV 11-0769.  
April 2, 2013.

**Background:** Resident brought action against city and city employee for assault and battery and trespass. The Superior Court, Maricopa County, No. CV2010-051615, Brian R. Hauser, Alfred M. Fenzel, JJ., dismissed for failure to pay a security bond, and resident appealed.

**Holdings:** The Court of Appeals, Gemmill, J., held that:

- (1) rule that required resident plaintiff to post a security bond did not unconstitutionally infringe on resident's fundamental rights or create an invidious classification, but
- (2) Superior Court's dismissal on the basis of non-payment of the bond constituted an abuse of discretion.

Reversed and remanded.

## West Headnotes

**[1] Municipal Corporations 268 ¶1040**

## 268 Municipal Corporations

## 268XVI Actions

## 268k1040 k. Costs. Most Cited Cases

Rule that required plaintiff resident who brought action against city and city employee for assault and battery and trespass to post a cost bond, if the defendant city established grounds for the security for taxable costs, rationally furthered a legitimate state interest, and when properly applied, did not unconstitutionally infringe on resident's funda-

mental rights or create an invidious classification; in accordance with the rule, if resident could establish an inability to give the security requested by city, the trial court was required to vacate any order requiring resident to post a bond, and the bond would have provided security in light of the difficulty of enforcing a judgment for costs against a person who did not own property within the state. A.R.S. Const. Art. 2, § 13; 16A.R.S. Rules Civ.Proc., Rule 67(d).

**[2] Appeal and Error 30 ¶179(4)**

## 30 Appeal and Error

## 30V Presentation and Reservation in Lower Court of Grounds of Review

## 30V(A) Issues and Questions in Lower Court

## 30k179 Sufficiency of Presentation of Questions

## 30k179(4) k. Constitutional questions. Most Cited Cases

Resident did not waive for purposes of appeal his argument that rule that required a plaintiff who was not an owner of property within the state to post a bond as security for the costs of litigation on a motion by defendant was facially unconstitutional under the Equal Privileges and Immunities Clause of the state constitution, even though he only first raised the argument in response to city's motion to require a cost bond, where resident was not facing the prospect of dismissal of his action against city and city employee until city filed motion to dismiss, and before dismissing the action, the trial court had the opportunity to consider, and presumably did consider, resident's constitutional argument. A.R.S. Const. Art. 2, § 13; 16 A.R.S. Rules Civ.Proc., Rule 67(d).

**[3] Appeal and Error 30 ¶893(1)**

## 30 Appeal and Error

## 30XVI Review

## 30XVI(F) Trial De Novo

## 30k892 Trial De Novo



30k893 Cases Triable in Appellate  
Court

30k893(1) k. In general. Most Cited  
Cases

Appellate Courts apply a de novo standard of review when determining the constitutionality of statutes and rules.

**[4] Costs 102 ➡ 116**

102 Costs

102VI Security for Costs; Proceedings in Forma  
Pauperis

102k116 k. Hearing and determination of ap-  
plication. Most Cited Cases

**Costs 102 ➡ 118**

102 Costs

102VI Security for Costs; Proceedings in Forma  
Pauperis

102k118 k. Amount of security. Most Cited  
Cases

**Costs 102 ➡ 137**

102 Costs

102VI Security for Costs; Proceedings in Forma  
Pauperis

102k137 k. Effect of failure to give security.  
Most Cited Cases

Trial court's dismissal of resident's action against city and city employee for assault and battery and trespass on the basis of nonpayment of a \$15,000 security bond constituted an abuse of discretion, where the court set the amount of the bond without consideration of information or evidence regarding the city's anticipated litigation costs. A.R.S. § 12-332; 16 A.R.S. Rules Civ.Proc., Rule 67(d).

**[5] Costs 102 ➡ 118**

102 Costs

102VI Security for Costs; Proceedings in Forma  
Pauperis

102k118 k. Amount of security. Most Cited

Cases

When fixing the amount of a security bond for taxable costs, in an action in which a plaintiff does not own property within the state that could satisfy a defendant's claim for costs in the litigation, the trial court may consider only those expenses that qualify as costs under statute; unless provided for by statute, a litigants' expenditures are not recoverable as costs. A.R.S. § 12-332; 16 A.R.S. Rules Civ.Proc., Rule 67(d).

**[6] Costs 102 ➡ 118**

102 Costs

102VI Security for Costs; Proceedings in Forma  
Pauperis

102k118 k. Amount of security. Most Cited  
Cases

A trial court properly sets the amount of a cost bond by considering such factors as the complexity and size of the case, number of parties involved, the likely number of depositions needed, the projected cost of transcripts, and any other factors pertinent to the estimated taxable costs of the defendant. A.R.S. § 12-332; 16 A.R.S. Rules Civ.Proc., Rule 67(d).

**\*207** James Thiele, Glendale, In Propria Persona Plaintiff/Appellant.

Iafrate & Associates By MicheleM. Iafrate,  
Phoenix, Attorneys for Defendants/Appellees.

**OPINION**

GEMMILL, Judge.

¶ 1 Appellant James Thiele challenges the constitutionality of Arizona Rule of Civil Procedure 67(d), which requires the trial court to order a plaintiff to provide security for costs on a showing that he does not own property within the state that could satisfy the defendant's claim for costs in the litigation. We hold that subsections (d) and (e) of Rule 67, when considered together, are facially constitutional. We further conclude, however, that the trial court erred in dismissing the action on the

basis of Thiele's failure to post a cost bond, because the amount of the bond was established in the absence of information regarding the estimated taxable costs of litigation.

#### FACTS AND PROCEDURAL HISTORY

¶ 2 Thiele filed a complaint alleging that a City of Phoenix Neighborhood Services Inspector assaulted him. According to Thiele, the City of Phoenix employee struck him in the face without any provocation. Thiele alleged assault and battery, trespass, and a claim under 42 U.S.C. § 1983.

¶ 3 The City filed a motion for security for costs pursuant to Rule 67(d), which provides:

At any time before trial of an issue of law or fact, on motion of the defendant, supported by affidavit showing that the plaintiff is not the owner of property within the state out of which the costs could be made by execution sale, the court shall order the plaintiff to give security for the costs of the action. The court shall fix the amount of the security, the time within which it shall be given and it shall be given upon condition that the plaintiff will pay all costs that may be adjudged against the plaintiff, and authorize judgment against the sureties, if a written undertaking. If the plaintiff fails so to do within the time fixed by the court, the court shall order the action dismissed without notice.

The City's Rule 67(d) motion alleged that although Thiele lived in Arizona, he did not own any property within the state that could satisfy a judgment for costs. The City included an affidavit attesting that Thiele did not own any property in Arizona.

¶ 4 The City asked the court to set the security for costs at \$30,000 but did not provide an estimate of the taxable costs of litigation to support its request. The City's motion, instead, described Thiele's previous civil action against the City regarding the same incident, which was dismissed without prejudice.<sup>FN1</sup> The City contended that Thiele's

“demonstrated pattern of dilatory tactics [was] likely to continue and increase the costs of litigation for Defendant.”

FN1. Thiele's previous action against the City, Maricopa County Superior Court cause number CV2007–051351, similarly alleged assault and battery, trespass, and a 42 U.S.C. § 1983 claim. The trial court in that case ordered that Thiele provide security for costs in the amount of \$15,000. The City filed a motion to dismiss based on Thiele's failure to post the security for costs. After oral argument on the City's motion to dismiss, the court dismissed the case without prejudice.

¶ 5 Thiele opposed the City's request for a \$30,000 security for costs, arguing it was excessive. He asked the court to order the City to provide a litigation cost estimate justifying its bond request. And he argued there was no legal basis for requiring a security for costs based on prior litigation.

¶ 6 The trial court granted the City's 67(d) motion, ordering Thiele to post the \$30,000 security. Thiele made a timely motion under \*208 Rule 67(e) to vacate the order, arguing he was financially unable to post the security. Rule 67(e) provides:

If the plaintiff, within five days after the order [requiring security], makes strict proof of inability to give the security, the order to give security shall be vacated. The proof may be made by affidavit, but if objection thereto is made by the defendant, the plaintiff shall submit to the court at a time designated by the court, when the plaintiff shall be examined orally as to the inability to give such security.

Thiele attached an affidavit to his motion stating that he could not afford to post a \$30,000 bond. The City requested that Thiele submit to an oral examination regarding whether he could post the security, and the court set an evidentiary hearing.

¶ 7 At the Rule 67(e) evidentiary hearing, Thiele was the only witness to testify. The trial court affirmed the order requiring Thiele to post a security for costs but reduced the amount of the bond to \$15,000. Because the record on appeal does not include a transcript of this hearing, we are unable to review Thiele's testimony. Based on the text of Rule 67(e), the prehearing filings, the minute entry of the hearing, and the court's ruling, we conclude the testimony related only to Thiele's assets, finances, and ability to post a bond.<sup>FN2</sup>

FN2. It is the appellant's obligation to provide all necessary portions of the record on appeal, including transcripts, and we generally presume that any missing portion of the record will support the trial court's ruling. *See Bee-Gee, Inc. v. Ariz. Dep't of Econ. Sec.*, 142 Ariz. 410, 414, 690 P.2d 129, 133 (App.1984). The issue in a Rule 67(c) hearing is whether the plaintiff can afford to post security for costs, and we presume the evidence recorded in the missing transcript supports the trial court's decision that Thiele could afford to post a \$15,000 bond for costs but not a \$30,000 bond. In light of the absence of any indication in the record, by minute entry or otherwise, that the court also addressed the separate issue of the City's estimated taxable costs of defending the action, we will not presume the court also addressed that issue.

¶ 8 In June 2011, the City filed a motion to dismiss based on Thiele's failure to post the security for costs. Thiele responded again that he was unable to pay the security set by the court. Thiele attached to his response an email from an insurance agent who explained he had exhausted every option to obtain a court bond on Thiele's behalf. Thiele argued that to dismiss his case because he could not afford to pay the security would unconstitutionally deny him access to the courts. After hearing oral argument, the court granted the City's motion to dis-

miss the case with prejudice.

¶ 9 Thiele timely appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).

### DISCUSSION

¶ 10 Thiele argues the dismissal of his case with prejudice for failure to post a security for costs violated his rights under the Arizona Constitution. He argues that Rule 67 is facially unconstitutional and, alternatively, the trial court abused its discretion in setting the amount of the security.

#### Facial Constitutionality of Rule 67(d) and (e)

[1][2][3] ¶ 11 We begin with Thiele's challenge to the facial constitutionality of Rule 67(d).<sup>FN3</sup> We apply a de novo standard of review when determining the constitutionality of statutes and rules. *See DeVries v. State*, 221 Ariz. 201, 204, ¶ 6, 211 P.3d 1185, 1188 (App.2009).

FN3. Thiele first asserted this constitutional argument in his response to the City's motion to dismiss. The City argues that Thiele waived his constitutional argument by failing to raise it earlier, in his initial lawsuit or in his response to the City's motion to require a cost bond. We conclude that Thiele has not waived his constitutional argument. First, he was not facing the prospect of dismissal of this action until the City filed its motion to dismiss based on Rule 67(d). Second, before dismissing the action, the trial court had the opportunity to consider, and presumably did consider, the constitutional argument Thiele raised in his response.

¶ 12 Thiele relies on the Equal Privileges and Immunities Clause of the Arizona Constitution, which provides:

**\*209** No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon

the same terms, shall not equally belong to all citizens or corporations.

Ariz. Const. art. 2, § 13. In *Hampton v. Chatwin*, 109 Ariz. 98, 99, 505 P.2d 1037, 1038 (1973), the Arizona Supreme Court held that this clause requires that “all citizens of our State, regardless of their financial status, must be afforded an equal opportunity to the courts.”

¶ 13 Arizona courts have struck down certain cost provisions as violating a plaintiff's constitutional right of access to the courts. See *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *New v. Ariz. Bd. of Regents*, 127 Ariz. 68, 618 P.2d 238 (App.1980). In *Eastin*, the Arizona Supreme Court considered a statute requiring a plaintiff to post a \$2,000 cost bond in order to proceed to trial after an adverse finding by the medical liability review panel. 116 Ariz. at 585, 570 P.2d at 753. The statute prohibited the court from waiving the bond requirement. *Id.* at 586, 570 P.2d at 754. Similarly, in *New*, the statute required a plaintiff to post a \$500 cost bond to file a breach of contract or negligence claim against the state. 127 Ariz. at 68–69, 618 P.2d at 238–39. In each case, the court held the cost bond requirement unconstitutional because it denied plaintiffs' access to the court system. *Eastin*, 116 Ariz. at 586, 570 P.2d at 754; *New*, 127 Ariz. at 70, 618 P.2d at 240.

¶ 14 The Equal Privileges and Immunities Clause, however, does not bar all cost bonds or filing fees. *Tahtinen v. Superior Court*, 130 Ariz. 513, 515, 637 P.2d 723, 725 (1981). In *Tahtinen*, the Arizona Supreme Court held that “unless a fundamental right is violated or an invidious classification is created, a statute impinging on the equal privileges and immunities of a class of Arizona residents will be upheld if it has a rational basis.” *Id.* A statute or rule has a rational basis “when it rationally furthers a legitimate legislative purpose.” *Id.*

¶ 15 The waiver provision in Rule 67(e) provides a constitutionally significant limitation on

Rule 67(d), thereby preventing any facially invidious classification related to the financial status of the litigants. Even when a defendant establishes grounds for the security for costs, such requirement must be waived if the plaintiff proves he cannot afford to pay the security. Ariz. R. Civ. P. 67(e). Put differently, Rule 67(d) does not unconstitutionally prohibit a plaintiff's access to the courts because, in accordance with Rule 67(e), if the plaintiff establishes an inability to give the security, the court must vacate the order requiring the security. See *Browning v. Corbett*, 153 Ariz. 74, 77, 734 P.2d 1030, 1033 (App.1986) (finding the filing fee in question did not prohibit access to courts because indigent litigant could obtain a waiver). In providing for a waiver, the Rule insures that “one party's economic interest in receiving its costs of litigation should it win” does not unconstitutionally deny a litigant access the courts. *Baltayan v. Getemyan*, 90 Cal.App.4th 1427, 110 Cal.Rptr.2d 72, 84 (2001).

¶ 16 Moreover, Rule 67(d) is reasonably calculated to achieve its legitimate purpose and does not suffer from the constitutional defects of the statutes in *Eastin* and *New*. The purpose of the statutes in *Eastin* and *New* was to deter frivolous litigation. *Tahtinen*, 130 Ariz. at 515, 637 P.2d at 725. The bonds at issue in those cases, however, essentially barred some meritorious claims based on the financial status of the litigant. *Id.* In contrast, Rule 67 does not mandate a bond in every civil case and applies only upon a showing that a plaintiff lacks property in the state that can be readily attached to satisfy a costs judgment. The Rule provides security in light of the difficulty of enforcing a judgment for costs against a person who does not own property within the state. See *Alshafie v. Lallande*, 171 Cal.App.4th 421, 89 Cal.Rptr.3d 788, 794 (Ct.App.2009) (analyzing a similar costs bond provision). The amount set under Rule 67 is not predetermined, but rather is reasonably calculated based on the estimated costs of litigation.

¶ 17 Because Rule 67 rationally furthers a legitimate state interest and, when properly applied,

does not unconstitutionally infringe on fundamental rights or create an invidious classification, the Rule does not violate the \*210 Equal Privileges and Immunities Clause of the Arizona Constitution.<sup>FN4</sup>

FN4. Thiele's constitutional argument on appeal focuses primarily on the Equal Privileges and Immunities Clause of the Arizona Constitution. His appellate brief references the Equal Protection Clause of the United States Constitution but does not develop that argument. Accordingly, Thiele has waived any argument under the U.S. Constitution. See ARCAP 13(a)(6); *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272, 1289 (App.2009).

#### Error in Fixing the Amount of the Bond

[4] ¶ 18 Even though Rule 67 is facially constitutional, it must be applied constitutionally and with sound discretion in each case. See *Simulnet E. Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 575–76 (9th Cir.1994) (“In requiring a security bond for defendants' costs, care must be taken not to deprive a plaintiff of access to the federal courts.”). We turn now to whether the trial court erred in setting the amount of the bond.

¶ 19 When a defendant is entitled to a bond as security for taxable costs, the court shall order and “fix the amount of the security.” Ariz. R. Civ. P. 67(d). Thiele did not initially contest that Rule 67(d) was applicable. Instead, he objected to the requested amount of the bond and asked the court to order the City to provide a litigation cost estimate to justify the amount requested. He further argued that the bond amount was excessive and without a proper basis. We are unable to find in the record any factual basis provided by the City for the trial court's decision to order a bond in the amount of \$15,000.

¶ 20 We apply an abuse of discretion standard when reviewing the amount of a bond for costs set by the trial court under Rule 67. See *Union Interchange, Inc. v. Benton*, 100 Ariz. 33, 35–37, 410

P.2d 477, 478–79 (1966) (applying an abuse of discretion standard of review in appeal challenging dismissal under Rule 67 and denial of a motion to set aside dismissal). A trial court abuses its discretion when its conclusion “was reached without consideration of the evidence.” *Grant v. Ariz. Public Serv. Co.*, 133 Ariz. 434, 455–56, 652 P.2d 507, 528–29 (1982) (citation omitted).

[5] ¶ 21 In fixing the amount of a security, the trial court must consider the estimated taxable costs of the litigation. Ariz. R. Civ. P. 67(d) (security is provided for the estimated “costs of the action”) (emphasis added). The trial court may consider only those expenses that qualify as costs under statute. See *Sweis v. Chatwin*, 120 Ariz. 249, 253–54, 585 P.2d 269, 273–74 (App.1978) (holding a trial court erroneously considered attorneys' fees in imposing a \$20,000 costs bond). Unless provided for by statute, litigants' expenditures are not recoverable as costs. *Stewart v. Lee-Stewart, Inc.*, 5 Ariz.App. 216, 220, 425 P.2d 118, 122 (1967) (citations omitted). The amount of security for costs under Rule 67 “must bear some reasonable relationship to the probable amount of costs that may ultimately be recoverable.” 20 C.J.S. *Costs* § 74 (2012)

[6] ¶ 22 Under Arizona law, “costs” is a term of art with specific legal meaning. The items that constitute taxable costs in the superior court are limited in number and are enumerated in A.R.S. § 12–332 (2003). This section allows for the recovery of expenses for officers and witnesses, depositions, referees, certified records or papers, and other expenses resulting from court orders (including mandatory filing fees) or from agreements between the parties. A.R.S. § 12–332(A). A trial court properly sets the amount of a cost bond by considering such factors as the complexity and size of the case, number of parties involved, the likely number of depositions needed, the projected cost of transcripts, and any other factors pertinent to the estimated taxable costs of the defendant. See *Hytken v. Wake*, 68 P.3d 508, 512 (Colo.App.2002); 2 Daniel J. McAuliffe

& Shirley J. Wahl, *Arizona Practice: Civil Trial Practice* § 13.14 (2d ed. 2001).

¶ 23 In this case, the City's Rule 67(d) motion did not attempt to estimate the costs of the litigation. Thiele asked the court to order the City to provide a costs estimate, but the court declined. Because the City did not provide an estimate of the anticipated costs or an appropriate explanation for the amount of the bond requested, Thiele was deprived of the opportunity to meaningfully \*211 challenge the requested amount. *See Simulnet*, 37 F.3d at 576 (explaining, under federal law, that the court must consider the reasonableness of the security from the perspective of both the defendant and the plaintiff).

¶ 24 In its request for security, instead of providing a calculation of the anticipated taxable costs, the City described Thiele's previously unsuccessful claim against the City and argued that a bond was necessary to protect it against dilatory tactics Thiele had displayed in the previous suit. Unlike comparable rules in some other jurisdictions, however, Rule 67(d) does not condition entitlement to a cost bond on a showing that the plaintiff is a vexatious litigant. *See, e.g., Cal.Code Civ. P. § 391.1* (requiring a party to furnish security on a showing that the party is a vexatious litigant and there is no reasonable probability that he will prevail in the instant litigation). Because the City has not argued that its taxable costs would include any out-of-pocket expenditures other than the ordinary costs allowed under A.R.S. § 12-332, Thiele's previous litigation conduct has limited relevance to the calculation of anticipated costs in this action under Rule 67(d).

¶ 25 Although the trial court did lower the amount of the security from \$30,000 to \$15,000 after the Rule 67(e) hearing, the record does not reveal that in doing so, the court considered an estimate of the costs of litigation. In accordance with Rule 67(e), the evidentiary hearing presumably focused on Thiele's inability to pay the ordered security instead of the defendant's estimated costs of the

suit. The amount of \$15,000 appears untethered to any analysis of estimated taxable costs.

¶ 26 The nature of Thiele's action strongly suggests that a \$15,000 security may be too high. Thiele's legal claims are based on one alleged assault. There are only three parties involved, and the factual contentions are not overly technical or complex. The basis of the suit does not involve a long timeline of events, nor does it appear to involve extensive documents. If provided the opportunity, Thiele could have argued that these aspects of the case support a security amount much lower than the court imposed. Although the City might be able to justify a \$15,000 security, the record here does not reveal the appropriate foundation because the amount of the bond must be based on reliable information regarding the taxable costs likely to be incurred by the City. Additionally, we note that A.R.S. § 12-345 (2003) relieves the City of the ordinary burden of costs payable to the court itself. Although this provision does not exempt the City from paying all taxable costs of litigation, *see City of Phoenix v. Kenly*, 21 Ariz.App. 394, 397, 519 P.2d 1159, 1162 (1974), it does reduce the City's estimated liability for costs.

## CONCLUSION

¶ 27 Rule 67 is facially constitutional. We further conclude that the trial court erred in dismissing this action on the basis of nonpayment of a security for costs, the amount of which was set without consideration of information or evidence regarding the City's anticipated taxable costs. We therefore reverse the judgment entered in favor of the City and remand this matter to the trial court for further proceedings including a new determination of any amount to be required in a cost bond.

CONCURRING: DIANE M. JOHNSEN, Acting Presiding Judge and JON W. THOMPSON, Judge.

Ariz.App. Div. 1, 2013.

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232 Ariz. 40, 301 P.3d 206, 657 Ariz. Adv. Rep. 8

(Cite as: 232 Ariz. 40, 301 P.3d 206)

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## **EXHIBIT 4**



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-004447

09/06/2013

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT  
R. Tomlinson  
Deputy

KEVIN BAILEY

KRISTA T MCCARTHY

v.

HAROLD JOHN WILHELMSSEN

SHANE DYET

FINANCIAL SERVICES-CCC

MINUTE ENTRY

East Court Building - Courtroom 513

1:28 p.m. This is the time set for Oral Argument regarding Defendant's Motion for Security of Costs filed on May 17, 2013. All parties appear telephonically. Appearing on behalf of the Plaintiff is counsel, Krista T. McCarthy. Appearing on behalf of the Defendant is counsel, Shane Dyet.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Argument is presented to the Court.

For the reasons set forth on the record,

**IT IS ORDERED** granting Defendant's Motion and directing Plaintiff to post a security bond in the amount of \$5,000, either in cash or the equivalent of cash, with the Clerk of Court.

1:37 p.m. Matter concludes.

## **EXHIBIT 5**

# U.S. Census Bureau News

U.S. Department of Commerce • Washington D.C. 20233

**For Immediate Release**  
**Tuesday, July 30, 2013 at 10:00 A.M. EDT**

CB13-124

Robert R. Callis  
Melissa Kresin  
Social, Economic, and Housing Statistics Division  
(301) 763-3199

## RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE SECOND QUARTER 2013

National vacancy rates in the second quarter 2013 were 8.2 percent for rental housing and 1.9 percent for homeowner housing, the Department of Commerce's Census Bureau announced today. The rental vacancy rate of 8.2 percent was 0.4 percentage points lower than the rate in the second quarter 2012 and the rate last quarter (+/-0.4). The homeowner vacancy rate of 1.9 percent was 0.2 percentage points lower than the second quarter 2012 rate (+/-0.2) and 0.2 percentage points lower than the rate last quarter (+/-0.1).

The homeownership rate of 65.0 percent was 0.5 percentage points (+/-0.4) lower than the second quarter 2012 rate (65.5 percent) and virtually unchanged from the rate last quarter (65.0 percent)\*.

New Residential Vacancies and Homeownership data for the third quarter 2013 will be released on Tuesday, October 29, 2013 at 10:00 A.M. EDT.  
Our Internet site is: <http://www.census.gov/housing/hvs>

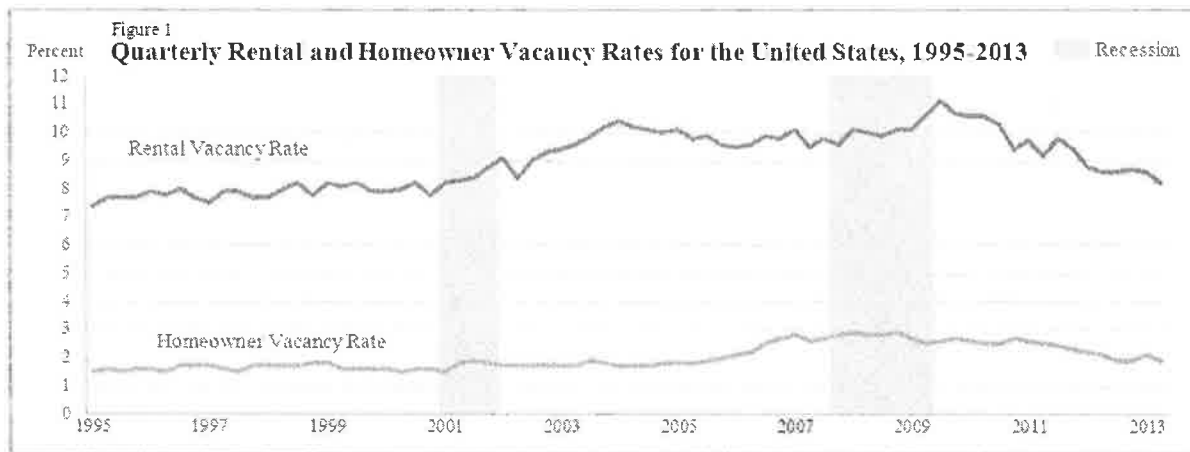


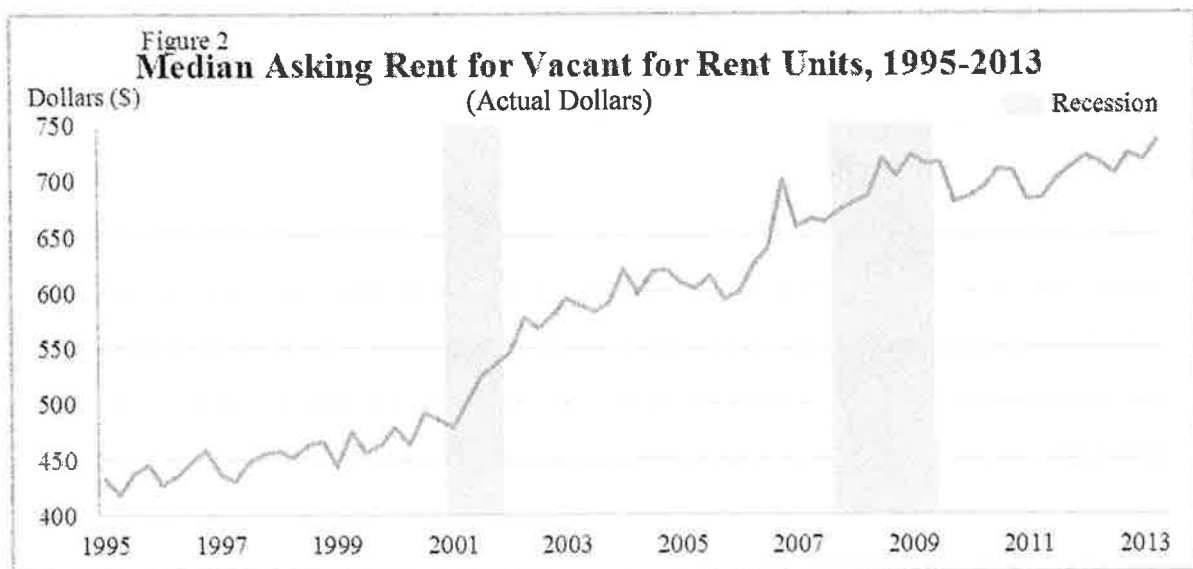
Table 1. Rental and Homeowner Vacancy Rates for the United States: 2005 to 2013 (in percent)

Year	Rental Vacancy Rate				Homeowner Vacancy Rate			
	First Quarter	Second Quarter	Third Quarter	Fourth Quarter	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
2013....	8.6	8.2			2.1	1.9		
2012....	8.8	8.6	8.6	8.7	2.2	2.1	1.9	1.9
2011....	9.7	9.2	9.8	9.4	2.6	2.5	2.4	2.3
2010....	10.6	10.6	10.3	9.4	2.6	2.5	2.5	2.7
2009....	10.1	10.6	11.1	10.7	2.7	2.5	2.6	2.7
2008....	10.1	10.0	9.9	10.1	2.9	2.8	2.8	2.9
2007....	10.1	9.5	9.8	9.6	2.8	2.6	2.7	2.8
2006....	9.5	9.6	9.9	9.8	2.1	2.2	2.5	2.7
2005....	10.1	9.8	9.9	9.6	1.8	1.8	1.9	2.0

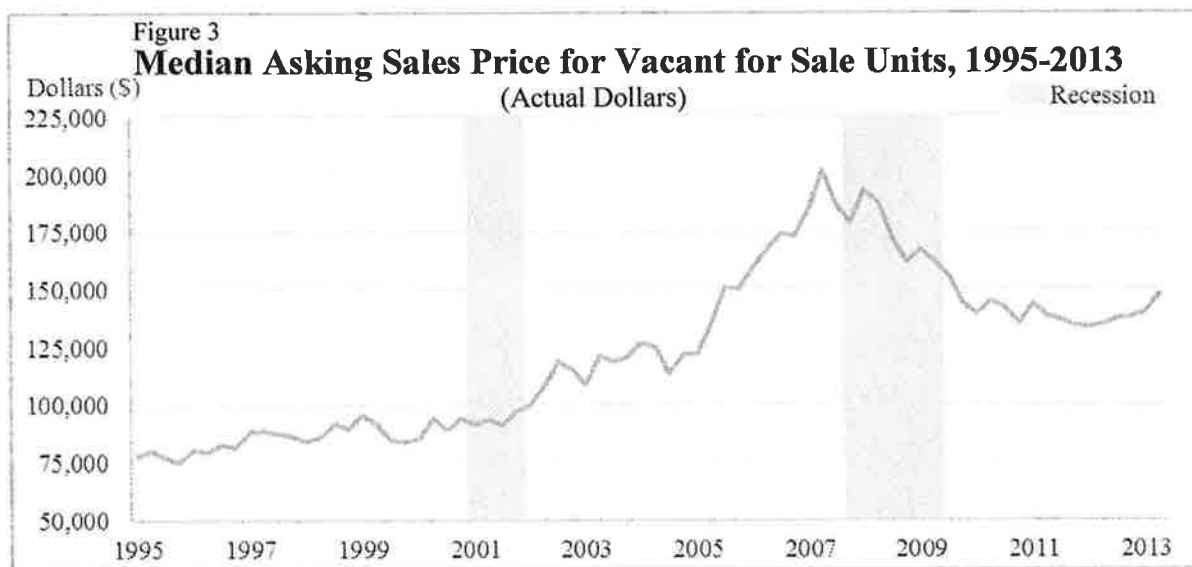
### Explanatory Notes

These statistics are estimated from sample surveys. They are subject to sampling variability as well as nonsampling error including bias and variance from response, nonreporting, and undercoverage. Whenever a statement such as "0.6 percentage points ( $\pm 0.5\%$ ) above" appears in the text, this indicates the range (0.1 to 1.1 percentage points) in which the actual percent change is likely to have occurred. All ranges given for percent changes are 90-percent confidence intervals and account only for sampling variability. If a range does not contain zero, the change is statistically significant. If the range does contain zero, the change is not statistically significant; that is, it is uncertain whether there was an increase or decrease. The data in this report are from the Current Population Survey/ Housing Vacancy Survey. The populations represented (the population universe) are all housing units (vacancy rates) and the civilian non-institutional population of the United States (homeownership rate). For an explanation of how the rates are calculated, please see pages 11-12. Explanations of confidence intervals and sampling variability can be found on our web site listed above. \*90% confidence interval includes zero. The Census Bureau does not have sufficient statistical evidence to conclude that the actual change is different from zero.

In the second quarter 2013, the median asking rent for vacant for rent units was \$735.



In second quarter 2013, the median asking sales price for vacant for sale units was \$147,600.



NOTE: Median asking sales price and median asking rent data for vacant units can be found in Historical Table 11A/B at <http://www.census.gov/housing/hvs/data/histabs.html>

\*The historical figures in the graphs are not adjusted for current dollars.

For rental housing by area, the second quarter 2013 vacancy rate inside principal cities (8.3 percent) was not statistically different from the rates in the suburbs (7.5 percent) or outside Metropolitan Statistical Areas (MSA's) (9.6 percent). The rental vacancy rate outside MSA's was higher than the rate in the suburbs. The rental vacancy rate inside principle cities was lower than a year ago, while the rates in the suburbs and outside MSA's were not statistically different from the second quarter 2012 rates.

The homeowner vacancy rate in principal cities (2.1 percent) was not statistically different from the rates in the suburbs (1.8 percent) or outside MSA's (2.0 percent). The homeowner vacancy rates in the suburbs and outside MSA's were not statistically different from each other. The homeowner vacancy rate inside principle cities was lower than a year ago, while the rates in the suburbs and outside MSA's were not statistically different from the corresponding second quarter 2012 rates.

Among regions, the rental vacancy rate was higher in the South (9.7 percent) than in the Northeast (7.3 percent) and the West (5.9 percent), but not statistically different from the Midwest (9.0 percent). The rental vacancy rate was lowest in the West. The rental vacancy rate in the South was lower than in the second quarter 2012, while the rates in the Northeast, Midwest, and West were not statistically different from last year.

For the second quarter 2013, the homeowner vacancy rate was higher in the South (2.1 percent) than in the West (1.6 percent), but not statistically different from the Northeast (1.8 percent) or the Midwest (1.9 percent). The Northeast and Midwest were not statistically different from each other. The homeowner vacancy rate in the West was lower than a year ago, while the rates in the Northeast, Midwest, and South were not statistically different from the second quarter 2012 rates.

**Table 2. Rental and Homeowner Vacancy Rates by Area and Region: Second Quarter 2012 and 2013 (in percent)**

Area/Region	Rental Vacancy Rates				Homeowner Vacancy Rates			
	Second Quarter 2012	Second Quarter 2013	90-Percent Confidence Interval ( $\pm$ ) <sup>a</sup>		Second Quarter 2012	Second Quarter 2013	90-Percent Confidence Interval ( $\pm$ ) <sup>a</sup>	
			of 2013 rate	of difference			of 2013 rate	of difference
United States.....	8.6	8.2	0.4	0.4	2.1	1.9	0.1	0.2
Inside Metropolitan Statistical Areas.....	8.5	8.0	0.4	0.4	2.0	1.9	0.2	0.2
In principal cities...	8.9	8.3	0.5	0.5	2.4	2.1	0.3	0.3
Not in principal cities (suburbs).....	8.1	7.5	0.6	0.6	1.8	1.8	0.2	0.2
Outside Metropolitan Statistical Areas.....	9.2	9.6	1.4	1.5	2.4	2.0	0.3	0.4
Northeast.....	6.7	7.3	0.7	0.8	1.7	1.8	0.3	0.4
Midwest.....	9.1	9.0	0.7	0.9	2.2	1.9	0.2	0.3
South.....	11.0	9.7	0.7	0.9	2.1	2.1	0.2	0.3
West.....	6.2	5.9	0.6	0.8	2.2	1.6	0.2	0.3

<sup>a</sup>A 90-percent confidence interval is a measure of an estimate's reliability. The larger the confidence interval is, in relation to the size of the estimate, the less reliable the estimate. For more information, see page 11.

NOTE: Metropolitan Statistical Area data for 2005 and later are not comparable to earlier data. Beginning in first quarter 2005, the Current Population Survey/Housing Vacancy Survey is using the new metropolitan and micropolitan statistical definitions that were announced by the Office of Management and Budget (OMB) in June 2003, and were based on the application of the 2000 standards to Census 2000 data. The OMB announced updates as of December 2003, based on application of the 2000 standards to more recent Census Bureau estimates. In this report, outside Metropolitan Statistical Areas includes micropolitan and non-metropolitan statistical areas. The December 2003 definitions are available at: <http://www.census.gov/population/metro/>

Approximately 86.4 percent of the housing units in the United States in the second quarter 2013 were occupied and 13.6 percent were vacant. Owner-occupied housing units made up 56.2 percent of total housing units, while renter-occupied units made up 30.2 percent of the inventory in the second quarter 2013. Vacant year-round units comprised 10.3 percent of total housing units, while 3.3 percent were for seasonal use. Approximately 2.7 percent of the total units were for rent, 1.1 percent were for sale only, and 0.9 percent were rented or sold but not yet occupied. Vacant units that were held off market comprised 5.6 percent of the total housing stock. Of these units, 1.8 percent were for occasional use, 0.9 percent were temporarily occupied by persons with usual residence elsewhere (URE), and 2.8 percent were vacant for a variety of other reasons.

**Table 3. Estimates of the Total Housing Inventory for the United States: Second Quarter 2012 and 2013\***  
(Estimates are in thousands and may not add to total, due to rounding)

Type	Second Quarter 2012/r	Second Quarter 2013	Difference Between Estimates	90-Percent Confidence Interval ( $\pm$ ) <sup>a</sup>		Percent of total (2013)
				of 2013 estimate	of difference	
All housing units.....	132,405	132,754	349	(X)	(X)	100
Occupied.....	113,931	114,677	746	249	227	86.4
Owner.....	74,660	74,543	-117	631	431	56.2
Renter.....	39,271	40,134	863	561	433	30.2
Vacant.....	18,473	18,077	-396	372	333	13.6
Year-round.....	13,992	13,701	-291	366	318	10.3
For rent.....	3,757	3,614	-143	169	190	2.7
For sale only.....	1,591	1,460	-131	92	118	1.1
Rented or Sold.....	1,049	1,151	102	74	102	0.9
Held off Market.....	7,595	7,476	-119	278	243	5.6
For Occ'l Use.....	2,407	2,449	42	163	141	1.8
Temp occ by URE...	1,268	1,255	-13	117	102	0.9
Other.....	3,920	3,773	-147	201	176	2.8
Seasonal.....	4,482	4,376	-106	240	211	3.3

\*The housing inventory estimates are benchmarked to 2010 Census.

<sup>a</sup>A 90-percent confidence interval is a measure of an estimate's reliability. The larger the confidence interval is, in relation to the size of the estimate, the less reliable the estimate. For more information, see page 11.

(X) Not Applicable. Since the number of housing units is set equal to an independent national measure, there is no sampling error, and hence no confidence interval.

/r Revised using vintage 2012 housing unit controls. See note below.

NOTE: Since first quarter 2003, the Current Population Survey/Housing Vacancy Survey (CPS/HVS) estimates have been controlled to an independent set of housing unit estimates produced annually by the Population Division from Census 2000 and 2010 and updated using building permit data, estimates of housing loss, and other administrative record data. Doing so makes the CPS/HVS estimates of housing units more comparable to other Census Bureau housing surveys controlled to these census-based estimates. The housing unit controls affect the estimate of vacant units in the sense that the estimates of total occupied and vacant units sum to the control total. Vacancy *rates* and homeownership *rates* are not affected by this change.

Beginning in the second quarter 2013, the housing inventory estimates are based on vintage 2012 housing unit controls that are projected forward through 2013. The second quarter 2013 housing inventory estimates, shown above, reflect vintage 2012 housing unit controls, benchmarked to the 2010 Census. The CPS/HVS historical table series, from the first quarter 2010 through the first quarter 2013, has also been revised based on vintage 2012 housing unit controls. These revised estimates and additional information on terms and definitions can be found at:

<http://www.census.gov/housing/hvs/data/histtabs.html>

For the methodology used in developing the housing unit estimates used for controls in the CPS/HVS, please see Population Division's website: <http://www.census.gov/popest/methodology/>

The homeownership rate of 65.0 percent was 0.5 percentage points (+/-0.4) lower than the second quarter 2012 rate (65.5 percent) and virtually unchanged from the rate last quarter (65.0 percent)\*.

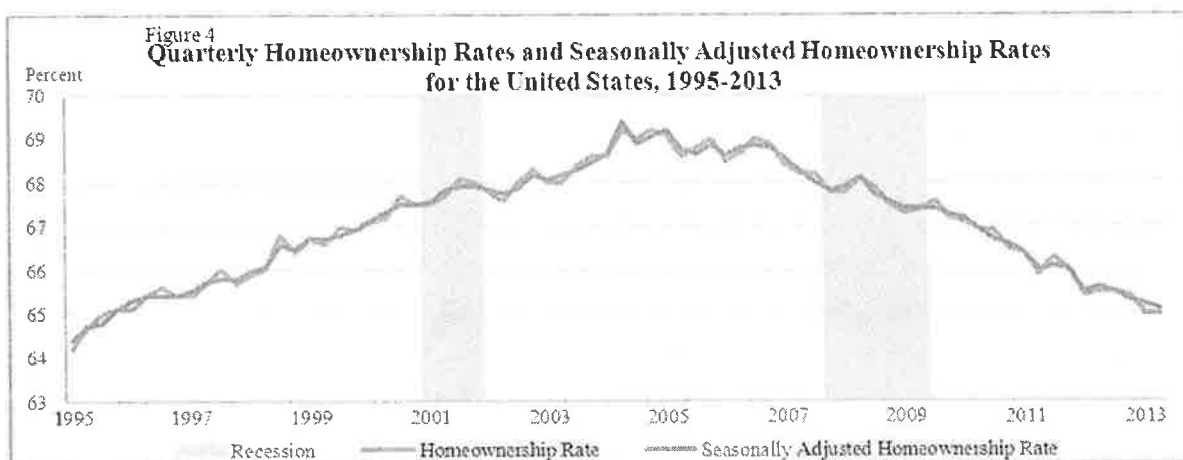


Table 4. Homeownership Rates for the United States: 1995 to 2013 (in percent)

Year	Homeownership Rates <sup>a</sup>			
	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
2013.....	65.0	65.0		
2012.....	65.4	65.5	65.5	65.4
2011.....	66.4	65.9	66.3	66.0
2010.....	67.1	66.9	66.9	66.5
2009.....	67.3	67.4	67.6	67.2
2008.....	67.8	68.1	67.9	67.5
2007.....	68.4	68.2	68.2	67.8
2006.....	68.5	68.7	69.0	68.9
2005.....	69.1	68.6	68.8	69.0
2004.....	68.6	69.2	69.0	69.2
2003.....	68.0	68.0	68.4	68.6
2002 <sup>b</sup> .....	67.8	67.6	68.0	68.3
2002.....	67.8	67.6	68.0	68.3
2001.....	67.5	67.7	68.1	68.0
2000.....	67.1	67.2	67.7	67.5
1999.....	66.7	66.6	67.0	66.9
1998.....	65.9	66.0	66.8	66.4
1997.....	65.4	65.7	66.0	65.7
1996.....	65.1	65.4	65.6	65.4
1995.....	64.2	64.7	65.0	65.1

<sup>a</sup>Standard errors for quarterly homeownership rates for the United States generally are 0.3 percent.

<sup>b</sup>Revised in 2002 to incorporate information collected in Census 2000.

\*90% confidence interval includes zero. The Census Bureau does not have sufficient statistical evidence to conclude that the actual change is different from zero.

Table 4SA shows the seasonally adjusted homeownership rates for the United States, from 1995 to the present. (Research has shown that seasonality for homeownership rates is present). When adjusted for seasonal variation, the current homeownership rate (65.1 percent) was lower than the rate in the second quarter 2012 (65.6 percent) and not statistically different from the rate last quarter (65.2 percent).

**Table 4SA. Homeownership Rates for the United States: 1995 to 2013 Seasonally Adjusted\***  
(in percent)

Year	Homeownership Rates <sup>a</sup> (Seasonally Adjusted)			
	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
2013.....	65.2	↓ 65.1		
2012.....	65.6	65.6	65.3	65.3
2011.....	66.5	66.0	66.1	66.0
2010.....	67.2	66.9	66.7	66.5
2009.....	67.4	67.4	67.4	67.2
2008.....	67.9	68.1	67.7	67.5
2007.....	68.5	68.3	68.0	67.8
2006.....	68.6	68.8	68.9	68.8
2005.....	69.2	68.8	68.7	68.9
2004.....	68.7	69.4	68.9	69.0
2003.....	68.1	68.2	68.3	68.5
2002 <sup>b</sup> .....	67.9	67.8	67.9	68.2
2001.....	67.6	67.9	67.9	67.9
2000.....	67.1	67.3	67.5	67.5
1999.....	66.7	66.7	66.8	66.9
1998.....	66.0	66.1	66.6	66.5
1997.....	65.5	65.7	65.8	65.8
1996.....	65.3	65.4	65.4	65.4
1995.....	64.4	64.7	64.8	65.1

\*As new quarterly data are input, previous quarters' seasonally adjusted homeownership rates may change.

<sup>a</sup>Standard errors for quarterly homeownership rates for the United States generally are 0.3 percent.

<sup>b</sup>Revised in 2002 to incorporate information collected in Census 2000.



For the second quarter 2013, the homeownership rates were highest in the Midwest (69.4 percent) and lowest in the West (59.4 percent). The homeownership rate in the South was lower than the corresponding second quarter 2012 rate, while the rates in the Northeast, Midwest, and West were not statistically different from the rates a year ago.

Table 5. **Homeownership Rates for the United States and Regions: 2007 to 2013** (in percent)

Year/Quarter	Homeownership Rates <sup>a</sup>				
	United States	Northeast	Midwest	South	West
2013					
Second Quarter.....	65.0	63.2	69.4	66.5	59.4
First Quarter.....	65.0	62.5	70.0	66.5	59.4
2012					
Fourth Quarter.....	65.4	63.9	69.7	67.0	59.5
Third Quarter.....	65.5	63.9	69.6	66.9	60.1
Second Quarter.....	65.5	63.7	69.6	67.4	59.7
First Quarter.....	65.4	62.5	69.5	67.5	59.9
2011					
Fourth Quarter.....	66.0	63.7	70.0	68.3	60.1
Third Quarter.....	66.3	63.7	70.3	68.4	60.7
Second Quarter.....	65.9	63.0	70.0	68.2	60.3
First Quarter.....	66.4	63.9	70.4	68.4	60.9
2010					
Fourth Quarter.....	66.5	64.1	70.5	68.5	61.0
Third Quarter.....	66.9	63.9	71.1	69.1	61.3
Second Quarter.....	66.9	64.2	70.8	69.1	61.4
First Quarter.....	67.1	64.4	70.9	69.2	61.9
2009					
Fourth Quarter.....	67.2	63.9	71.3	69.1	62.3
Third Quarter.....	67.6	64.0	71.6	69.7	62.7
Second Quarter.....	67.4	64.3	70.5	70.0	62.5
First Quarter.....	67.3	63.7	70.7	69.6	62.8
2008					
Fourth Quarter.....	67.5	64.0	71.4	69.8	62.7
Third Quarter.....	67.9	64.4	71.9	69.9	63.5
Second Quarter.....	68.1	65.3	71.7	70.2	63.0
First Quarter.....	67.8	64.7	72.0	69.7	62.8
2007					
Fourth Quarter.....	67.8	64.6	71.7	70.0	62.7
Third Quarter.....	68.2	65.2	71.9	70.1	63.5
Second Quarter.....	68.2	65.4	71.8	69.9	64.1
First Quarter.....	68.4	64.8	72.2	70.6	63.6

<sup>a</sup>Standard errors for quarterly homeownership rates by region generally are 0.6 percent.

For the second quarter 2013, the homeownership rates were highest for those householders ages 65 years and over (80.9 percent) and lowest for the under 35 years of age group (36.7 percent). The rates for householders 35 to 44 and 65 years and older were lower than the second quarter 2012 rates. The rates for householders less than 35, 45 to 54, and 55 to 64 were not statistically different from the second quarter 2012 rates.

**Table 6. Homeownership Rates by Age of Householder: 2007 to 2013 (in percent)**

Year/Quarter	Homeownership Rates <sup>a</sup>					
	United States	Under 35 years	35 to 44 years	45 to 54 years	55 to 64 years	65 years and over
2013						
Second Quarter...	65.0	36.7	60.3	70.9	76.7	80.9
First Quarter.....	65.0	36.8	60.1	71.3	77.0	80.4
2012						
Fourth Quarter.....	65.4	37.1	60.4	72.1	77.6	80.7
Third Quarter.....	65.5	36.3	61.8	72.0	76.9	81.4
Second Quarter...	65.5	36.5	62.2	71.4	77.1	81.6
First Quarter.....	65.4	36.8	61.4	71.3	77.8	80.9
2011						
Fourth Quarter.....	66.0	37.6	62.3	72.7	79.0	80.9
Third Quarter.....	66.3	38.0	63.4	72.7	78.6	81.1
Second Quarter...	65.9	37.5	63.8	72.3	77.8	80.8
First Quarter.....	66.4	37.9	64.4	73.1	78.6	81.0
2010						
Fourth Quarter.....	66.5	39.2	63.9	72.7	79.0	80.5
Third Quarter.....	66.9	39.2	65.2	73.0	79.2	80.6
Second Quarter...	66.9	39.0	65.6	73.6	78.7	80.4
First Quarter.....	67.1	38.9	65.3	74.8	79.1	80.6
2009						
Fourth Quarter.....	67.2	40.4	65.7	74.0	78.9	80.2
Third Quarter.....	67.6	39.8	66.5	74.5	79.4	80.9
Second Quarter....	67.4	39.0	66.8	74.5	79.9	80.4
First Quarter.....	67.3	39.8	65.7	74.6	79.8	80.4
2008						
Fourth Quarter.....	67.5	40.3	66.6	74.5	79.7	80.4
Third Quarter.....	67.9	41.0	67.2	75.2	80.0	80.1
Second Quarter....	68.1	41.2	67.6	75.4	80.1	80.2
First Quarter.....	67.8	41.3	66.7	75.0	80.4	79.9
2007						
Fourth Quarter.....	67.8	41.0	67.2	75.1	80.4	80.3
Third Quarter.....	68.2	42.0	68.1	75.2	81.1	79.9
Second Quarter....	68.2	41.9	67.6	75.5	80.6	80.5
First Quarter.....	68.4	41.7	68.3	75.8	80.4	80.9

<sup>a</sup>Standard errors for quarterly homeownership rates by age of householder generally are 0.5 percent.

For the racial categories shown below, the homeownership rate for the second quarter 2013 for non-Hispanic White householders reporting a single race was highest at 73.3 percent. The rate for All Other Races householders was second at 54.5 percent and Black Alone householders was lowest, at 42.9 percent. The homeownership rate for Black Alone householders was lower than the second quarter 2012 rate, while the rates for non-Hispanic White and All Other Race householders were not statistically different from the rates last year.

The homeownership rate for Hispanic householders (who can be of any race), 45.9 percent, was not statistically different from the second quarter 2012 rate.

**Table 7. Homeownership Rates by Race and Ethnicity of Householder: 2009 to 2013 (in percent)**

Year/Quarter	Homeownership Rates <sup>a</sup>				
	United States	Non-Hispanic White alone	Black Alone <sup>b</sup>	All Other Races <sup>c</sup>	Hispanic (of any race)
2013					
Second Quarter...	65.0	73.3	42.9	54.5	45.9
First Quarter.....	65.0	73.4	43.1	54.6	45.3
2012					
Fourth Quarter.....	65.4	73.6	44.5	55.2	45.0
Third Quarter.....	65.5	73.6	44.1	54.6	46.7
Second Quarter...	65.5	73.5	43.8	55.0	46.5
First Quarter.....	65.4	73.5	43.1	55.1	46.3
2011					
Fourth Quarter.....	66.0	73.7	45.1	56.5	46.6
Third Quarter.....	66.3	73.8	45.6	56.4	47.6
Second Quarter...	65.9	73.7	44.2	56.0	46.6
First Quarter.....	66.4	74.1	44.8	56.7	46.8
2010					
Fourth Quarter.....	66.5	74.2	44.8	57.7	46.8
Third Quarter.....	66.9	74.7	45.0	57.3	47.0
Second Quarter...	66.9	74.4	46.2	55.7	47.8
First Quarter.....	67.1	74.5	45.6	57.2	48.5
2009					
Fourth Quarter.....	67.2	74.5	46.0	58.4	48.4
Third Quarter.....	67.6	75.0	46.4	57.8	48.7
Second Quarter...	67.4	74.9	46.5	57.6	48.1
First Quarter.....	67.3	74.7	46.1	57.4	48.6

<sup>a</sup>Standard errors for quarterly homeownership rates by race and ethnicity of householder generally are 0.3 percent for non-Hispanic White (single race) householders, 0.6 percent for Black (single race) householders, 0.7 percent for All Other Races householders, and 0.6 percent for Hispanic householders.

<sup>b</sup>The homeownership rate for second quarter 2013 for householders who reported Black whether or not they reported any other race was 42.9 percent.

<sup>c</sup>Includes people who reported Asian, Native Hawaiian or Other Pacific Islander, or American Indian or Alaska Native regardless of whether they reported any other race, as well as all other combinations of two or more races.

NOTE: Beginning in 2003, the question on race on the CPS was modified to comply with the revised standards for federal statistical agencies. Respondents may now report more than one race, but small sample sizes preclude showing all race categories. The question on Hispanic origin is asked separately, and is asked before the question on race. For further information on each major race group and the Two or More Races populations, see reports from the Census 2000 Brief series (C2KBR/01), available on the Census 2000 website at: <http://www.census.gov/population/www/cen2000/briefs.html>

The homeownership rate for households with family incomes greater than or equal to the median family income was lower than the second quarter 2012 rate (80.5 percent). The rate for those households with family incomes less than the median family income was not statistically different from the second quarter 2012 rate (50.6 percent).

Table 8. **Homeownership Rates by Family Income: 2008 to 2013 (in percent)**

Year/Quarter	Homeownership Rates <sup>a</sup>		
	United States	Households with family income greater than or equal to the median family income <sup>b</sup>	Households with family income less than the median family income
2013*			
Second Quarter.....	65.0	79.7	50.3
First Quarter.....	65.0	80.0	50.0
2012*			
Fourth Quarter.....	65.4	80.4	50.3
Third Quarter.....	65.5	80.3	50.6
Second Quarter.....	65.5	80.5	50.6
First Quarter.....	65.4	80.3	50.4
2011*			
Fourth Quarter.....	66.0	80.8	51.3
Third Quarter.....	66.3	81.3	51.3
Second Quarter.....	65.9	81.2	50.6
First Quarter.....	66.4	81.5	51.4
2010*			
Fourth Quarter.....	66.5	81.7	51.4
Third Quarter.....	66.9	81.9	51.9
Second Quarter.....	66.9	81.9	51.9
First Quarter.....	67.1	82.0	52.2
2009			
Fourth Quarter.....	67.2	81.8	50.2
Third Quarter.....	67.6	81.9	51.7
Second Quarter.....	67.4	82.2	51.5
First Quarter.....	67.3	82.4	51.0
2008			
Fourth Quarter.....	67.5	82.9	51.2
Third Quarter.....	67.9	83.0	52.0
Second Quarter.....	68.1	83.5	51.8
First Quarter.....	67.8	82.8	51.2

<sup>a</sup>Standard errors for quarterly homeownership rates by family income generally are 0.3 percent.

<sup>b</sup>Based on family or primary individual income.

\*Beginning in 2010, we began imputing missing values for the family income question, which is used in the homeownership table above. Previously, householders not responding to this question were excluded from the homeownership calculations for those below/above the median family income level. When compared to previous procedures, this change resulted in an increase in the homeownership rate of 1.9 percentage points for those at or below the median family income and an increase of 0.4 percentage points for those above the median family income level for the second quarter 2013. Under previous procedures (not imputing missing values) for the second quarter 2013, the homeownership rate was 48.4 percent for those at or below the median family income and 79.3 percent for those above the median family income level. Data users should keep this in mind when comparing data from 2010 and later to earlier data.

Note: This press release, along with more detailed data, is available on the Internet. Our Internet address is: <http://www.census.gov/housing/hvs>

The estimates in this release are based on a sample survey and therefore are subject to both sampling and non-sampling error. Sampling error is a result of not surveying the entire population. Non-sampling error occurs because accurate information cannot always be obtained.

The sample estimate and its standard error enable one to construct a confidence interval. A confidence interval is a measure of an estimate's reliability. The larger a confidence interval is in relation to the size of the estimate, the less reliable the estimate. For example, the standard error on the estimated rental vacancy rate of 8.2 percent is 0.225 percentage points. Then the 90-percent confidence interval is calculated as  $8.2 \pm (1.645 \times 0.225)$  percent, or  $8.2 \pm 0.4$  percent, or from 7.8 percent to 8.6 percent. If all possible samples were surveyed under essentially the same general conditions and the same sample design, and an estimate calculated from each sample, then 90 percent of the estimates would fall within the 90 percent confidence interval, in this case, from 7.8 percent to 8.6 percent.

Since the first quarter 2003, the Current Population Survey/Housing Vacancy Survey (CPS/HVS) housing inventory estimates have been controlled to independent housing unit estimates based upon Census 2000 (2000-2009 data) and Census 2010 (2010-present data) and updated with building permit data, estimates of housing loss, and other administrative records data. In the second quarter 2013, the CPS/HVS revised the series of housing inventory estimates back to the first quarter 2010, based on the latest series of independent housing controls, the vintage 2012 time series. Housing inventory estimates from the second quarter 2000 through the fourth quarter 2009 are revised based on the vintage 2010 time series. Housing inventory estimates, prior to the second quarter 2000, have not been revised. The CPS/HVS housing inventory data series are based on the independently produced vintage 2012 housing unit estimates that are projected forward through the second quarter 2013. The vintage 2012 estimates are benchmarked to the 2010 Census. The same general procedure will be followed each year in revising housing inventory estimates with the most up-to-date independent housing estimates available.

For an explanation of the methodology used in producing the housing inventory independent estimates, please see: <http://www.census.gov/popest/methodology>

Note: This time series is by the latest "vintage" year. For example, vintage 2012 means that all of the estimates in this time series are identified as belonging to "vintage 2012." The 2010 data are from the 2012 vintage, the 2011 data are from the 2012 vintage, and so on.

The CPS/HVS also began computing first-stage factors (used for weighting purposes) based on year-round and seasonal counts of housing units from Census 2000 for the first quarter 2003. From 1980 to 2002, the CPS/HVS first-stage factors were based on year-round estimates only. The effect on the data is slight and the change should improve the counts of year-round and seasonal units. For more information on the effects of these changes, please see Source and Accuracy Statement at: <http://www.census.gov/housing/hvs>

Beginning in the first quarter 2012, the population controls reflect the results of the 2010 decennial census. This change has virtually no effect on vacancy and homeownership rates, as described below.

Research has shown that the new 2010-based controls increased the rental vacancy rate in April 2010 from 10.43 percent to 10.45 percent---a difference of less than 1/10 of one percent. The homeowner vacancy rate remained the same at 2.63 percent, while the homeownership rate was up from 66.67 percent to 66.74 percent.

The question on race on the CPS was modified beginning in the first quarter 2003 to comply with new standards for federal statistical agencies. Respondents are now asked to report one or more races. The question on Hispanic origin is asked separately, and is asked before the question on race.

First stage factors for year-round vacant units have been corrected as of the second quarter 2004. Research has shown that this correction had no significant effect on the vacancy rates or homeownership rates.

The rental vacancy rate is the proportion of the rental inventory that is vacant for rent. In tables 1 and 2, the rates are computed using the following formula.

$$\text{Rental Vacancy Rate (\%)} = \left[ \frac{\text{Vacant year-round units for rent}}{\left( \begin{array}{c} \text{Renter} \\ \text{occupied} \\ \text{units} \end{array} \right) + \left( \begin{array}{c} \text{Vacant year-round} \\ \text{units rented but} \\ \text{awaiting occupancy} \end{array} \right) + \left( \begin{array}{c} \text{Vacant year-round} \\ \text{units for rent} \end{array} \right)} \right] * 100$$

The homeowner vacancy rate is the proportion of the homeowner inventory that is vacant for sale. In tables 1 and 2 the rates are computed using the following formula.

$$\text{Homeowner Vacancy Rate (\%)} = \left[ \frac{\text{Vacant year-round units for sale only}}{\left( \begin{array}{c} \text{Owner} \\ \text{occupied} \\ \text{units} \end{array} \right) + \left( \begin{array}{c} \text{Vacant year-round} \\ \text{units sold but} \\ \text{awaiting occupancy} \end{array} \right) + \left( \begin{array}{c} \text{Vacant year-round} \\ \text{units for sale only} \end{array} \right)} \right] * 100$$

The homeownership rate is the proportion of households that is owner-occupied. It is computed by dividing the number of households that are occupied by owners by the total number of occupied households (tables 4, 4SA, and 5).

$$\text{Homeownership Rate (\%)} = \left[ \frac{\text{Owner occupied housing units}}{\text{Total occupied housing units}} \right] * 100$$

For the homeownership rate for a specific characteristic (tables 6-8), use the owner and total number of units for that characteristic. For example, for the West region,

$$\text{Homeownership Rate (West) (\%)} = \left[ \frac{\text{Owner occupied housing units (West)}}{\text{Total occupied housing units (West)}} \right] * 100$$

## **EXHIBIT 6**

1 **WEST and ZICKERMAN, P.L.L.C.**  
2 310 So. Williams Blvd., Ste. 250  
3 Tucson, AZ 85711  
4 (520) 790-3055 or 790-7337  
5 FAX (520) 748-0852  
6 [gib@wzlawaz.com](mailto:gib@wzlawaz.com)

Herman C. Zickerman  
Pima County Computer No. 64228  
State Bar of Arizona No. 003976

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
8 **IN AND FOR THE COUNTY OF PIMA**

9 PAUL THOMAS, a single man; and LUKAS  
10 THOMAS, minor child, by and through  
11 Tonya Thomas, his legal guardian.

12 Plaintiffs,

13 vs.

14 CORTNEY MARIA QUINTANA and JOHN  
15 DOE QUINTANA, wife and husband; and  
16 ABC CORPORATIONS 1-5; MNO  
17 LIMITED LIABILITY COMPANIES 1-5;  
18 XYZ PARTNERSHIPS 1-5; JOHN DOES 1-  
19 5 and JANE DOES 1-5,

20 Defendants.

No. C20115806

**PLAINTIFFS' RESPONSE TO  
DEFENDANT'S MOTION FOR  
SECURITY FOR COSTS**

Hon. Stephen Villarreal

21 Plaintiffs hereby respond to the Motion for Security for Costs filed by Defendant, Cortney  
22 Maria Quintana. The rule relating to posting security for costs cannot properly be applied in this case  
23 and is unconstitutional. This Response is supported by the entire record of these proceedings,  
24 including the following Memorandum of Points and Authorities.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **Background**

27 Contrary to what the defense motion says, THIS IS NOT A SLIP AND FALL CASE. This  
28 is a rear-end collision in which the Plaintiffs were stopped and the Defendant simply plowed into  
the rear of the vehicle. The Defendant was cited by the police. Further, the defense has raised  
frivolous non-party at fault claims, none of which meet the facts of this case.



1 The Defendant has named everyone from the unknown owner of a dog that crossed the road  
2 to Toyota Motor Company. The Plaintiff was stopped behind a vehicle in the roadway that had its  
3 emergency flashers on. The reason for the stop did not cause the Defendant to plow into the Plaintiff.  
4 Her inattention did that all by itself. It would be like claiming a person who stops for traffic and  
5 causes the driver behind him to stop is somehow causing a third driver to not stop. The likelihood  
6 of a defense verdict is slim to none.

#### 7 Argument

8 The very premise of Rule 67(d) is anathema to our legal system. The rule uniquely subjects  
9 a claimant seeking justice to a standard such that if the claimant cannot afford justice, it will not be  
10 provided to him. Rule 67(d) essentially requires that access to the justice system is dependent on  
11 one's ability to afford it.

12 In addition, the underlying premise of Defendant's Motion is based on speculation that she  
13 may eventually be the prevailing party at trial. This, of course, makes no sense. There is no  
14 determination as to the merits or probable outcome of the case involved in the Court's decision for  
15 cost bond. As stated above, the likelihood of a defense verdict is slim to none.

16 Even though there is no corresponding federal rule similar to A.R.C.P. 67(d), federal courts  
17 do have the inherent authority to order the posting of a bond. In exercising this authority, federal  
18 courts evaluate multiple factors to determine whether the posting of a bond is appropriate. *See,*  
19 *Murphy v. Ginorio*, 989 F.2d 66 (ast Cir. 1993). As the *Murphy* court indicated, federal courts not  
20 only consider the fact that plaintiff is not a resident of Arizona, but also look at the probability of  
21 success; the reasonable extent of security; the background and purpose of the suit; and the preclusive  
22 affect that an order requiring security might have on a plaintiff. For the Court in this case to order  
23 the posting of a bond pursuant to the rule without evaluation of these and other factors is simply  
24 improper.

25 Again, there has been no argument by the Defendant that Plaintiffs' claims lack merit or are  
26 frivolous. There has been no showing by the Defendant that more likely than not, they will be the  
27 successful party. As such, there is no basis for Defendant's request for a cost bond in this case.

1 There is no basis for the Court to prejudge the outcome of the litigation, and potentially deprive  
2 Plaintiffs and their statutory beneficiaries of their day in court.

3 Rule 67(d) is also flawed because it acts as a shield for defendants only to protect them in  
4 the event of success on the merits. There does not exist, however, any similar protective measure  
5 under the rules of plaintiffs in civil actions in Arizona. In this case, the Defendant seeks to use the  
6 rule as a sword, to deny Plaintiffs the right to maintain claims asserted in this litigation. The Court  
7 should not allow this to occur. It should also deny Defendant's Motion because Rule 67(d) is  
8 unconstitutional.

9 1. The cost bond requirement of Rule 67(d) violates Plaintiffs' right to due process and  
10 equal protection and is unconstitutional.

11 The Fourteenth Amendment to the United States Constitution provides that no state shall  
12 "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend.  
13 XIV, § 1. The Arizona Constitution also contains an equal protection clause. Ariz. Const. Art. 2  
14 § 13. Its reach is co-extensive with that of the federal guarantee. *Westin Tucson Hotel Co. v. State*  
15 *Dep't of Revenue*, 188 Ariz. 360, 366, 936 P.2d 183, 189 (App. 1997). "The word 'person' in this  
16 context includes 'both lawfully admitted resident aliens as well as citizens of the United States and  
17 entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.'"  
18 *Avila v. Biedess*, 206 Ariz. 311, 78 P.3d 280 (App. 2003) (quoting *Graham v. Richardson*, 403 U.S.  
19 365, 371, 91 S.Ct. 1848 (1971)).

20 In addition, Article 2, Section 13 of the Arizona Constitution provides that "No person shall  
21 be deprived of life, liberty or property without due process of law." Under the due process clause,  
22 legislation is constitutional only if it is not unreasonable, arbitrary or capricious, and if the means  
23 selected in the statute have a real and substantial relation to the goals sought to be obtained. *Bryant*  
24 *v. Continental Conveyor & Equipment Co.*, 156 Ariz. 193, 197, 751 P.2d 509 (1988). Rule 67(d)  
25 deprives certain plaintiffs of their due process rights guaranteed by both the Arizona and United  
26 States Constitutions in two respects.

1 First, the Rule would purportedly deprive Plaintiffs of their property without a right to a  
2 hearing if he were not indigent. See Rule 67(e). Since it is admitted that Plaintiffs are not the  
3 owners of property in Arizona, the rule requires that the Court "order the Plaintiff to give security  
4 for the costs of the action" and "fix the amount of the security . . ." Rule 67(d). Although an indigent  
5 plaintiff may show an inability to give the security (Rule 67(e)), there simply is no mechanism by  
6 which non-indigent plaintiffs may contest the amount of security ordered.

7 The second, but related, due process deprivation is that Rule 67(d) sets no guidelines for or  
8 limitations on the trial court in determining the amount of security which a plaintiff must post. Rule  
9 67(d) is especially arbitrary because it requires a plaintiff to post security for costs before the  
10 Defendant even incurs those costs and before there is any hearing on the merits of the case.

11 The issue here was addressed by the Alaska Supreme Court in *Patrick v. Lynden Transport,*  
12 *Inc.*, 765 P.2d 1375 (Ak. 1988). In *Patrick* an out-of-state truck lessor brought suit against in-state  
13 lessee seeking damages for himself and a class of truck owners whose leases the lessee allegedly  
14 breached. The Supreme Court held that "the statute [requiring an out-of-state plaintiff to post a  
15 bond] violates equal protection of law under the Alaska Constitution because it unreasonably  
16 restricts nonresident access to Alaska courts." *Id.* at 1376.

17 The Court, recognizing that access to the courts is an important right, applied the strict  
18 scrutiny test to determine whether requiring costs from non-residents was constitutional:

19 [T]he purpose of the statute is to provide security for costs and  
20 attorney fees that may be awarded against a plaintiff, from whom it  
21 may be difficult to collect because of the plaintiff's non-residence.  
22 While this purpose may be legitimate, we do not believe the  
23 legislature's chosen means to effectuate this purpose are sufficiently  
24 well-tailored to its ends where the important constitutional right of  
25 access to the courts is infringed. The statute is both over inclusive  
26 and under inclusive. First, it is over inclusive because it requires that  
27 a bond be posted by all nonresident plaintiffs. Yet, it cannot be  
28 assumed that all nonresident plaintiffs will be uncooperative in  
paying cost and attorney fee awards entered against them. Nor can it  
be assumed that all nonresident plaintiffs will not have assets easily  
attachable in satisfaction of a cost and attorney fee award. Second,  
the statute is under inclusive because it assumes that only non-  
resident plaintiffs will be difficult debtors. The statute ignores the  
fact that resident defendants also may be uncooperative in paying cost  
and attorney fee awards and that defendants may have a more difficult

1 time collecting from illiquid resident plaintiffs than from liquid  
2 foreign plaintiffs.

3 We conclude that a statute which restricts access to Alaska courts by  
4 means of a bond requirement for only nonresident plaintiffs is not  
5 sufficiently related to the purpose of providing security for cost and  
6 attorney fee awards to defendants to withstand a challenge under the  
7 Alaska Constitution's guarantee of equal protection under the law.

8 *Id.* at 1379-80.

9 The analysis and holding of the Alaska Supreme Court applies perfectly here. "Under the  
10 Arizona Constitution, claimants have a fundamental right to bring and pursue an action for  
11 damages." *Lerma v. Keck*, 186 Ariz. 228, 232, 921 P.2d 28, 32 (App. 1996) (emphasis added)  
12 (citing *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984)). Likewise, "[s]trict scrutiny applies  
13 when the legislation impinges upon a fundamental right or discriminates based upon a suspect  
14 classification." *Id.* (Citing *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 842 P.2d 1355  
15 (App. 1992)).

16 For a discriminatory statute to rule to be upheld, it must be necessary to achieve a compelling  
17 state interest. *Id.* at 78, 688 P.2d at 970. A.R.C.P. Rule 67(d) does not serve a compelling state  
18 interest. *E.g., Haschak v. McKinley, M.D.*, Case No. CV 1987-34896, Maricopa County Superior  
19 Court (June 2, 1989) (Hon. Barry C. Schneider) (holding that ensuring the collectibility of costs is  
20 not compelling). Simply put, ensuring the collectibility of costs from non-residents is not among the  
21 interests which are typically recognized as compelling, such as public safety, security of health. The  
22 rule thus cannot pass constitutional muster.

23 2. The Rule 67(d) bond requirement violates the Privileges and Immunities clause and is  
24 unconstitutional.

25 Article 2, Section 13 of the Arizona Constitution provides as follows:

26 No law shall be enacted granting to any citizen, class of citizens, or  
27 corporations other than municipal, privileges or immunities which,  
28 upon the same terms, shall not equally belong to all citizens or  
corporations.

1 Rule 67 creates classifications which violate the Arizona Privileges and Immunities clause  
2 in several ways. First, and most obvious, it discriminates between plaintiffs who own property in  
3 Arizona and plaintiffs who do not. Only the latter must post security for costs.

4 Second, Rule 67(d) discriminates between plaintiffs and defendants who own no property  
5 in Arizona. For instance, defendants who seek affirmative relief from cross-claims and third party  
6 complaints need not post security for costs. Despite the fact that plaintiffs turned counter-defendants  
7 may have as much interest in requesting a counter-claimant or third party plaintiff to post a bond,  
8 there is no mechanism for such. Rule 67(d) applies to, and penalizes, first party "plaintiffs" only.

9 Third, the Rule discriminates against and includes only "plaintiffs" not owning property in  
10 the State of Arizona. There is no similar provision for "defendants" not owning property in Arizona.  
11 It states:

12 At any time before trial of an issue of law or fact, on motion of the  
13 defendant, supported by affidavit showing the plaintiff is not the  
14 owner of property within the state out of which the costs could be  
made by execution sale, the court shall order the plaintiff to give  
security for the costs of the action . . . (Rule 67(d), Emphasis Added)

15 In Arizona, the successful party is generally entitled to receive its taxable costs from the  
16 unsuccessful party in litigation. Yet, Rule 67(d) creates a mechanism requiring only a plaintiff to  
17 post a bond in the event his claims are unsuccessful, regardless of the merits of the cause of action.  
18 The rule does not allow a mechanism for a plaintiff to request a similar bond from an uninsured  
19 defendant, or a defendant who has no property in the State of Arizona, in order to continue with the  
20 litigation. The effect and potential outcome remains the same, yet Rule 67(d) imposes the burden  
21 only upon the plaintiff. In doing so, it violates Article 2, Section 13 of the Arizona Constitution.

22 Fourth, Rule 67(f) discriminates between public entities, certain executors, administrators  
23 and guardians, and other plaintiffs, since they are completely exempt from posting security for costs.  
24 The Rule "taxes" only those who can least afford it. Surely, this cannot be a justiciable rule, when  
25 one's ability to access the system becomes dependent upon the financial ability to pay for it, and  
26 then, singles out those who can least afford it.

1 The courts utilize three tests to determine the constitutionality of legislation or court rules  
2 which create such classifications. The least restrictive test is the "rational basis" test which upholds  
3 a regulation imposing burdens on one class but not another, if the court can find some legitimate  
4 state interest served by the legislation, and the facts permit the court to conclude that the  
5 classification rationally furthers the state's legitimate interest. A second and intermediate test is the  
6 "means-scrutiny" test which the courts generally use in analyzing classifications based upon gender  
7 and illegitimacy.

8 Finally, the "strict scrutiny" test upholds a discriminatory statute only if it serves a  
9 "compelling state interest" and the regulation is "necessary" to achieve the legislative objective.  
10 This test is applied where a law limits a "fundamental right." *Kenyon v. Hammer*, 142 Ariz. 69, 78-  
11 79, 688 P.2d 961 (1984).

12 The right to bring and pursue a civil action is a fundamental right guaranteed by Article 18,  
13 § 6 of the Arizona Constitution. *Kenyon v. Hammer, supra*, 142 Ariz. at 83. Further, where the  
14 fundamental right to bring or pursue the action is affected, . . . courts will not apply the rational basis  
15 analysis." *Id.* (Emphasis Added).

16 In *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977), the Arizona Supreme Court  
17 considered the constitutionality of A.R.S. § 12-567(1). It held that this provision of the Medical  
18 Malpractice Act, which required that the party who lost the panel proceeding post a \$2,000 bond in  
19 order to continue to proceed with the litigation was unconstitutional. Applying a strict scrutiny test  
20 (See, *Kenyon v. Hammer* at 83, 688 P.2d at 975), the Court in *Eastin* held that the statute violated  
21 the constitution because, as to indigents, it denied them access to the courts, and as to non-indigents,  
22 it placed a heavier burden upon their access to the courts.

23 Under *Eastin v. Broomfield*, Rule 67(d) is likewise unconstitutional. Rule 67(d), if enforced,  
24 would place a heavier burden upon persons such as Paul and Lukas Thomas in gaining access to the  
25 courts. This discriminatory rule can be upheld only if a compelling state interest exists and if it is  
26 necessary to achieve that objective. The defense has not identified any compelling state interest that  
27 would allow the enforcement of Rule 67(d).

1 In *New v. Arizona Board of Regents*, 127 Ariz. 68, 618 P.2d 238 (App. 1980), the court held  
2 that A.R.S. § 12-823, which required plaintiffs to file a bond for costs of the State in any contract  
3 or negligence action brought against the State, violated the privileges and immunities clause of the  
4 Arizona Constitution as to indigents by denying them access to the courts and as to non-indigents  
5 by placing a heavier burden on their access to the courts. The court held that “[t]he bond  
6 requirement of A.R.S. § 12-823 is a monetary blockade to access to the courts and is therefore  
7 violative of constitutional rights.” 127 Ariz. at 70.

8 In this case, the Defendant improperly seeks to invoke Rule of Civil Procedure 67(d) and  
9 request an order compelling Plaintiffs to provide a bond for security of taxable costs. If Plaintiffs  
10 do not post the security in the time ordered by this Court, “the court shall order the action dismissed  
11 without notice.” Rule 67(d), 16 A.R.S. Thus, as in *Eastin and Regents*, the security requirement  
12 imposed by Rule 67(d) places a “heavier burden” or a “monetary blockade” on Plaintiffs’ right to  
13 bring and pursue this action. Since that right is a “fundamental right” guaranteed by Article 18, §  
14 6 of the Arizona Constitution, Rule 67(d) “is valid only if it serves a compelling state interest and  
15 is necessary to the attainment of that interest.” *Kenyon v. Hammer, supra*, 142 Ariz. at 83. The  
16 Defendant cannot meet its burden of showing a compelling state interest.

17 **a. Rule of Civil Procedure 67(d) serves no compelling State interest.**

18 If the purpose of Rule 67(d) is to ensure collection of taxable costs against an unsuccessful  
19 plaintiff who owns no property in Arizona, the internal distinctions in the Rule do not sustain that  
20 purpose. No matter how frivolous their pleadings may be, cross-claimants, third-party plaintiffs,  
21 who do not seek affirmative relief, and certain executors, administrators and guardians need not post  
22 security even if they own no property in Arizona. Moreover, although Tonya Thomas is the legal  
23 guardian of Lukas Thomas, under Arizona law, if Ms. Thomas was formally appointed Lukas’s  
24 guardian *ad litem* for purposes of this case, the exemption would apply and Ms. Thomas would not  
25 need to post security in that capacity (ironically, she would still not be able to avoid the requirement  
26 of herself). Thus, Rule 67(d) does not advance the alleged purpose of insuring collection of costs  
27

1 from unsuccessful parties. Not all unsuccessful parties who lack property in Arizona are required  
2 to post security for costs.

3 More fundamentally, our Supreme Court has noted that:

4 the state has neither a compelling nor legitimate interest in providing  
5 economic relief to one segment of society by depriving those who  
6 have been wronged of access to, and remedy by, the judicial system.  
*Kenyon v. Hammer, supra*, 142 Ariz. at 84.

7 In short, Rule 67(d) serves no compelling state interest and is thus unconstitutional.

8 **b. Rule 67(d) is not necessary to the attainment of any State interest.**

9 Even if some compelling state interest could be found in Rule 67(d), the Rule nevertheless  
10 is unconstitutional unless the Rule is "necessary" to the attainment of that compelling state interest.  
11 *Kenyon v. Hammer, supra*, 142 Ariz. at 83. The determination of "necessity" requires consideration  
12 of "adjudicative facts" developed in this case or "legislative facts which are established truths, facts  
13 or pronouncements that do not change from case to case. *Id.* 142 Ariz. at 84. Under the strict  
14 scrutiny test, the showing of "necessity" cannot be based upon hypothesis, speculation or deference  
15 to some unspecified legislative conception. *Id.* at 87.

16 In this case, the defense has not contended that these Plaintiffs will not voluntarily pay their  
17 taxable costs if they are unsuccessful in this litigation. It merely speculates about witnesses and  
18 costs. Thus, no "adjudicative facts" exist which would support the discriminatory classifications in  
19 Rule 67. Moreover, no "legislative facts" exist in this case.

20 Further, there is no showing to support the proposition that plaintiffs who own no property  
21 in Arizona are more likely to file unmeritorious pleadings, be unsuccessful in their litigation, or  
22 avoid payment of taxable costs than similarly situation cross-claimants or defendants, or plaintiffs  
23 who own property in Arizona.

24 As already noted, the standard under which statutes that affect the fundamental right to bring  
25 an action are analyzed is strict scrutiny. *Kenyon v. Hammer*, 142 Ariz. 69, 83, 688 P.2d 961, 975  
26 (1984). For a discriminatory statute to be upheld, it must be necessary to achieve a compelling state  
27 interest. *Id.* at 78, 688 P.2d at 970. A.R.C.P. Rule 67(d) does not serve a compelling state interest.



1 *E.g., Haschak v. McKinley, M.D.*, CV1987-34896, Maricopa County Superior Court (June 2, 1989)  
2 (Hon. Barry Schneider) (holding that ensuring the collectibility of costs is not compelling).

3 Even if Defendant Quintana claims that the purpose of the cost bond statute is to deter  
4 frivolous litigation, that interest is not compelling and would not even pass the "rational basis" test.  
5 *Tahtinen v. Superior Court*, 130 Ariz. 513, 515 637 P.2d 723, 725 (1981). The court in *Tahtinen*  
6 stated:

7 The cost bond statutes in *Eastin [supra]* and [*New v. Arizona Bd. of*  
8 *Regents*, 127 Ariz. 68, 618 P.2d 238 (1980),] did not have a rational  
9 basis. The purpose of the statute was to deter frivolous litigation.  
10 The frivolity *vel non* of litigation is not related to the financial status  
11 of the litigants. By denying access to the courts to indigents with  
meritorious claims and granting it to the wealthy with frivolous  
claims, the bond provisions of the statutes were grossly overinclusive  
and underinclusive. The defects are so great that it cannot be said  
they rationally furthered a legitimate legislative purpose.

12 Thus, as stated in *Tahtinen*, requiring a cost bond fails to meet the much lower "*rational basis*" test;  
13 therefore, it clearly fails to meet the more rigorous "*strict scrutiny*" standard and is unconstitutional.

14 Plaintiff Paul Thomas was a roofer before the motor vehicle collision that is the subject of  
15 this lawsuit, and made approximately \$17,000.00 per year. Since the collision, he has worked odd  
16 jobs and is barely able to meet his needs. Plaintiff Lukas Thomas is a 10-year-old boy who lives  
17 with his aunt, Tonya Thomas, along with his teen-age brother. They are not indigent, but they also  
18 do not have the means to post a cost bond. As such, the Defendant is attempting to force Plaintiffs  
19 to forego their remedies. Under *Eastin*, it is inappropriate for a heavier burden to be placed upon  
20 a plaintiff because of his financial situation; allowing a defendant to do so would be unconstitutional.

21 The decisions of other judges of the Maricopa County Superior Court are of course not  
22 binding and have no true precedential value. Nonetheless, it is important that the Court know that  
23 Judges Schneider, O'Melia and Fields, between 1989 and 2005, have all held Rule 67(b) to be  
24 unconstitutional.

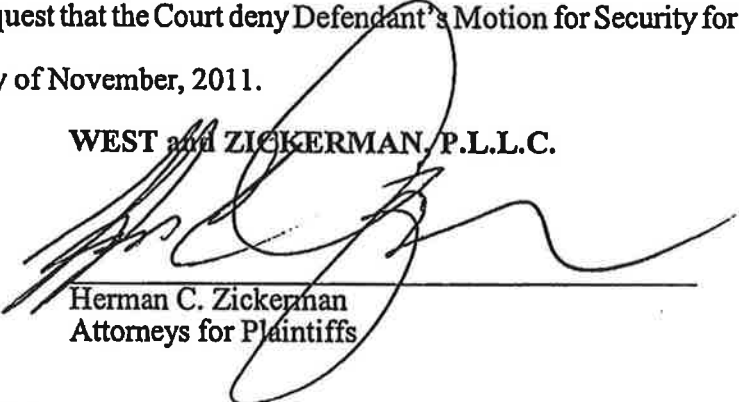
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CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant's Motion for Security for Costs.

DATED this 7<sup>th</sup> day of November, 2011.

WEST and ZICKERMAN, P.L.L.C.

  
Herman C. Zickerman  
Attorneys for Plaintiffs

THIS 7<sup>th</sup> day of November, 2011:

ORIGINAL filed with the  
Pima County Superior Court Clerk

COPY hand-delivered to:  
Hon. Stephen Villarreal

COPIES mailed to:  
Christopher L. Wilson  
Potts & Associates  
2401 W. Peoria Ave., Ste. 100  
Phoenix, AZ 85029  
Attorney for Defendant

By:   
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